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Nos. 81-1077 and 81-1088

In The

Supreme Court of the United States

October Term, 1981

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Amendment precludes maintenance of this action to abolish the Nebraska State Legislature's traditional practice of beginning each day's sitting with an invocation from its chaplain provided for by the Legislature's rules of proceedings.

2. Whether other fundamental principles of federalism require the federal courts to refrain from exercising jurisdiction over this action.

3. Whether petitioners, consisting of the individual members of the Legislature's Executive Board, the Chaplain, and the State Treasurer, are entitled to absolute legislative immunity from respondent's suit.

4. Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution.

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States District Court for the District of Nebraska (Warren K. Urbom, C. J.).

   a. Memorandum and Order filed November 24, 1980, overruling petitioners' motion to dismiss on grounds of legislative immunity. *See,* Exhibit A.

   b. Judgment and Memorandum of Decision filed on December 24, 1980, reported at 504 F. Supp. 585 (1980) (Exhibits B and C). The district

court found the practice of the legislative invocation by a Chaplain constitutional and dismissed the legislator petitioners from the action. However, the court further found the expenditure of public funds to compensate the Chaplain and to print legislative prayer books unconstitutional for violation of the Establishment Clause and enjoined the Treasurer from making such expenditures and the Chaplain from accepting his compensation.

2. United States Court of Appeals for the Eighth Circuit.

   a. Opinion of a three-judge panel, filed on April 14, 1982, affirming in part and reversing in part the judgment of the district court and remanding the case to the district court for further action consistent therewith, reported at 675 F. 2d 228 (1982) (Exhibit D). The Court of Appeals determined that the several elements of the Nebraska legislative prayer practice should not be viewed separately, but as a whole, and ruled that the prayer practice violated the Establishment Clause because of the retention of a single clergyman, paid for his services, as the exclusive source of the morning invocations over an extended period of time, and because it involved the publishing of prayer books.

   b. Order of May 12, 1982, staying the mandate of the court for 60 days from that date. (Exhibit E).

GROUNDS FOR JURISDICTION

The judgment of the United States District Court for the District of Nebraska was entered on December 24, 1980, following a trial to the court on December 1, 1980 (Exhibits B and C). Thereafter, petitioners Palmer and Marsh timely appealed to the Court of Appeals for the Eighth

Circuit those portions of the district court judgment determining that jurisdiction was proper and finding the expenditure of public funds to pay the Legislative Chaplain violative of the Establishment Clause. Respondent timely appealed the balance of the district court judgment finding the underlying prayer practice constitutional.

Oral arguments were heard by the Court of Appeals on October 13, 1981. Its opinion affirming in part and reversing in part the district court's judgment was entered on April 14, 1982 (Exhibit D). Petitioners immediately moved for a stay of the mandate pending the filing and disposition of their petition for writ of certiorari. By order dated May 12, 1982, the Court of Appeals stayed the mandate for 60 days from that date, to be extended until final disposition of the case by this court upon the filing of a certificate of the clerk of this court stating that the petition for writ of certiorari has been filed (Exhibit E).

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1), which authorizes the review of civil cases by writ of certiorari granted upon the petition of any party thereto after judgment of the Court of Appeals.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS THE CASE INVOLVES

1. *The Tenth Amendment to the United States Constitution*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

2. *The First Amendment to the United States Constitution*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

3. *The Fourteenth Amendment to the United States Constitution*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. *42 U.S.C. § 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

5. *Article III, Section 10 of the Nebraska Constitution*

[T]he Legislature shall determine the rules of its proceedings and be the judges of the election, returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor. . . .

6. *Rule 1, Section 2 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

A. Election of Officers

. . .
. . .

Sec. 2. Officers To Be Approved. In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers:

Chief Clerk of the Legislature
Assistant Clerk of the Legislature
Sergeant at Arms
Chaplain

7. *Rule 1, Section 21 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

E. Other Offices

. . .
. . .

Section 21. Chaplain. The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

8. *Rule 7 (A), Section 1(b) of the Rules of the Nebraska Unicameral*

RULE 7—PROCEEDINGS AND MOTIONS

(A) Order of Business

Section 1. Meeting Time, Restrictions. . . .

(b) The order of business of the Legislature shall be as follows; except as otherwise provided by the Speaker.

a. Prayer by the Chaplain

b. Roll call

. . .
. . .

STATEMENT OF THE CASE

Respondent invoked the jurisdiction of the district court authorized by 42 U. S. C. § 1983 to challenge the Nebraska Legislature's longstanding tradition of opening each day's legislative sitting with an invocation from the legislative Chaplain.

Respondent is a taxpayer and citizen of the State of Nebraska, and a duly elected member of the Nebraska Unicameral Legislature. Petitioner Palmer is an ordained Presbyterian clergyman, and has served as Legislative Chaplain for every session since 1965. Petitioner Marsh at the time of this action was State Treasurer and was responsible for administering the expenditure of funds compensating the Chaplain monthly and defraying the costs of publishing several hundred copies of prayer books in the legislative years 1975, 1978, and 1979. The remaining petitioners are members of the Legislature's Executive Board.

Pursuant to the internal rules of the Legislature, at the onset of each two year legislative session its Executive Board recommends an individual to serve as Chaplain for that session to the full Legislature for its advice and consent. The Legislature typically sits for three or four months of each year. The Chaplain is compensated in the approximate amount of $320.00 per month by the State Treasurer in the same manner as are all legislative employees at the Legislature's direction for each month of service. The internal rules of the Legislature declare the Chaplain's sole responsibility to be to open each day's sitting with an invocational prayer, which is the first step of each day's official proceedings.

In three past years, 1975, 1978 and 1979, upon motion from the floor, assorted invocations were collected and published in very limited supply at state expense, for distribution to the legislative membership and to the public upon request so long as the supply would last. Two hundred copies of the 1975 book, two hundred copies of the 1978 book, and one hundred copies of the 1979 book were printed.

The relief sought by respondent is a permanent injunction enjoining petitioner members of the Nebraska Legislature's Executive Board from implementing the legislative rules providing for the retention of a Chaplain, and enjoining the current Chaplain, Robert E. Palmer, from assuming the post of Chaplain and receiving compensation from the state in that capacity. He further seeks to enjoin the State Treasurer from expending public funds for the payment of the Chaplain's salary and for the printing and transcription of the daily prayers and their subsequent printing and publication. Respondent finally seeks a declaration that the legislative rules providing for the legislative Chaplain are unconstitutional, void and unenforceable.

Prior to trial, petitioners moved to dismiss the action on grounds of legislative immunity, which motion was overruled. After trial, the district court found that the Establishment Clause of the First Amendment to the Constitution was not violated by having the daily prayers to open each day's sitting, but was violated by compensating a Chaplain and by publishing and distributing the prayer books. The district court distinguished this case from other Establishment Clause cases decided by the Supreme

Court by noting that the prayer practice represented an internal act—that is one directed at the Legislature itself for its own members, rather than toward the public. On the basis of this distinction, the court found that providing for the morning invocations by internal rule did not amount to the "making of a law" as contemplated by the Establishment Clause.

Applying the traditional, purpose-effect-entanglement analysis employed in Establishment Clause cases, the court found a clearly secular purpose for the practice to be bringing the legislators to order by means of brief, solemn and thoughtful act in a traditional manner. It further found the effect of the prayer practice to be primarily secular, declaring that any actual effect of the legislative prayers on religion was virtually nonexistent on the basis of the record made in this case. The court finally found that the prayer practice did not excessively entangle the state in religious affairs.

Beyond the morning prayer practice, however, the district court did conclude that the expenditure of public funds for the Chaplain's salary and the costs of printing the prayer books, and the very publication of the prayer books itself, did violate the Establishment Clause. It was the payment of a Chaplain, the court said, that had a direct and immediate religious effect of securing a continuing relationship with a particular cleric of one denomination, at least for the several-month session of the Legislature. This apparently was deemed to violate the Establishment Clause. The printing and publication of the prayer books was invalidated as having no secular purpose.

Consistent with these findings, the district court dismissed the defendant members of the Executive Board

from the lawsuit, declared the payment of the Chaplain from public funds and the printing at state expense of the prayers in prayer books unconstitutional, and enjoined the State Treasurer and the Chaplain from undertaking such acts.

Petitioners Marsh and Palmer appealed to the Court of Appeals for the Eighth Circuit the district court's judgment regarding jurisdiction of the action, and its finding on the merits that the compensation of the Chaplain violated the Establishment Clause. The ruling as to the printing of prayer books was *not* appealed. Respondent cross-appealed the balance of the judgment finding the underlying prayer practice constitutional. The Court of Appeals affirmed in part and reversed in part the judgment of the district court, employing a significantly different analysis of the case.

The Court of Appeals first ruled that the district court erred in examining the compensation of the chaplain independently from the other elements of the prayer practice since respondent essentially challenged the practice as a whole. Nevertheless, in subsequently declaring the practice as a whole violative of the Establishment Clause, it singled out the retention and compensation of a single chaplain for an extended period of time and the printing of the prayer books as determinative of its inquiry, while at the same time noting that it did not intend to hold legislative prayer practices, or legislative chaplains—even paid chaplains—*per se* unconstitutional. The opinion does not recognize or address the fact that petitioners did not raise the prayer book issue on appeal.

In applying the three-part Establishment Clause test, the court summarily concluded: "[T]he purpose of the

practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time, . . ." (Exhibit D, p. 11). No reference to any evidence in the record supporting that conclusion is made, nor is the testimony of the Executive Board chairman, that Palmer was retained because he had done a good job over the years and would have been removed if it were thought his retention would be viewed as an endorsement of his religion, acknowledged (T123). Similarly, the opinion does not acknowledge Palmer's testimony that he had "never made salary a point of my being asked to be Chaplain." (Dep., p. 4).

The Court of Appeals also found the Nebraska prayer practice to have the primary effect "unmistakably to advance religion and to give preference to one religious view", (Exhibit D, p. 12), on the basis of its conclusion that Palmer's retention for sixteen years amounted to the Legislature's seal of approval of his religious views, and would have led observers to conclude that the Legislature had an official view on religion. No evidence in the record was cited in support of these findings.

Finally, the court found, again without reference to any compelling evidence in the record in support thereof, that compensating the same clergyperson chaplain for sixteen years engenders serious political division along religious lines amounting to an excessive entanglement between government and religion. After moving for and receiving a stay of the mandate of the Court of Appeals, petitioners filed this petition for a writ of certiorari, seeking review of that court's judgment declaring the Nebraska Legislature's retention and compensation of a single Chap-

lain for an extended period of time violative of the Establishment Clause.

REASONS FOR GRANTING THE WRIT

I.

This case raises substantial jurisdictional questions grounded on Tenth Amendment sovereign immunity, fundamental principles of federalism, and the common law legislative immunity doctrine.

This action is nothing less than an attempt to use the federal judiciary to override the Nebraska State Legislature's will on a matter of purely internal operations, which respondent admits (T21-24). The use of the federal judiciary to interfere in such a manner with the internal proceedings of a state legislature raises the following jurisdictional questions.

A.

Tenth Amendment Sovereign Immunity

In its most notable examination of the Tenth Amendment to the United States Constitution to date, this court determined in *National League of Cities v. Usery*, 426 U. S. 833 (1976), that valid exercises of Congress' legislative power cannot be used in a fashion that would impair the integrity of the states or their ability to function in a federal system. Clarifying this principle further, the court stated that if constitutionally valid exercises of federal legislative power would impair "functions essential to separate and independent existence" of the states, *Id.* at 845,

or would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions", *Id.* at 852, such exercise would not be permitted.

Petitioners remain steadfast in their contention that maintenance of this action pursuant to the authority of 42 U. S. C. § 1983 would have the precise consequence foreclosed by the *National League of Cities'* decision. Notwithstanding that respondent's complaint meets the technical pleading prerequisites for stating a § 1983 claim, it is unmistakably clear that a grant of the relief he requests would have the effect of displacing the Nebraska State Legislature's freedom to structure for itself its own internal proceedings. Certainly, that freedom is the kind of attribute of state sovereignty contemplated by that decision as protected by the Tenth Amendment from federal interference.

Petitioners are mindful that *National League of Cities* articulated the scope of the Tenth Amendment's restraint on exercises of federal legislative power in the context of certain Commerce Clause legislation, and that the court has expressed reluctance to extend its application to situations involving other kinds of constitutionally authorized exercises of federal legislative power. Further, it is recognized that a determination of the Tenth Amendment's preclusive effect on federal legislation authorizing civil rights lawsuits, such as 42 U. S. C. § 1983, well may turn on considerations not addressed in *National League of Cities.* However, the fact remains that due to the uniqueness of the activities challenged here, the consequence of maintaining this action is precisely that which was of concern to the court in its decision. Indeed, it is this very uniqueness

which sets this case apart from the mainstream of § 1983 lawsuits and which could be acknowledged as warranting only a limited extension of Tenth Amendment restraint on such civil rights lawsuits.

B.

Fundamental Principles of Federalism

Limits on federal interference with state functions and activities do not derive exclusively from notions of state sovereignty and balance of power embodied in the Tenth and Eleventh Amendments. Fundamental principles of federalism have been cited in recent cases as requiring federal judicial restraint where the consequence would be to interfere with state criminal proceedings, *Younger v. Harris*, 401 U. S. 37 (1971), to impair state's civil proceedings, *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1974), or to obstruct other judicial activities or functions deserving of substantial and proper respect by the federal courts. *Juidice v. Vail*, 420 U. S. 327 (1977).

Rizzo v. Goode, 423 U. S. 362 (1976), extended the doctrine of federal judicial restraint based on principles of federalism and equity beyond cases involving state judicial functions to those concerned with state executive branch functions. Even though the complainants in that case satisfied the technical standing and pleading prerequisites of § 1983, this court indicated that the federal courts still were obliged to discern the real nature of the lawsuit in deciding upon the availability and scope of relief:

> When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the

> Nation, subsisting side by side with 50 state judicial, legislative and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. Doran v. Salem Inn, Inc., 442 U. S. 922, 928, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975).

423 U. S. at 379.

The same consideration is equally warranted where state legislative functions are involved. The substantial interest of the State of Nebraska in the freedom of its Legislature to structure its own internal operations and proceedings could not be more obvious. Maintenance of this action would serve as a precedent for other challenges in federal court to the Legislature's will with respect to a host of internal matters which are and should be political and controversial within the legislative chamber. The recognition that state legislators may not contest the justiciability of outside challenges to their internal deliberations on such matters by invoking the political question doctrine, as their federal counterparts can do, *E'rod v. Burns*, 427 U. S. 347 (1976), compels a greater deference to principles of federalism in exercising federal judicial restraint in entertaining such challenges, particularly where, as here, the complainant has made no effort to seek relief through the state judiciary.

C.

Legislative Immunity

It is now settled that state legislators sued in federal court cannot invoke the Speech and Debate Clause immunity provided by the United States Constitution, they are entitled to invoke common law legislative immunity in appropriate instances. *Lake Country Estates, Inc. v.*

Tahoe Regional Planning Agency, 440 U. S. 391 (1979), *Supreme Court of Virginia v. Consumer's Union*, 446 U. S. 719 (1980). Moreover, the principles determining the scope and application of Speech and Debate Clause immunity for federal legislators are the same as those used in determining the scope and application of common law legislative immunity in civil suits against state legislators. *Supreme Court of Virginia v. Consumer's Union, supra.* Common law legislative immunity properly invoked by state legislators or their aides is absolute; it bars both damage and perspective injunctive actions. *Id.* at 731-733.

Respondent has sought to enjoin the following specific acts mandated by the internal rules of the Legislature: (1) the biennial vote of its Executive Board by which an individual is recommended to serve as Chaplain for the ensuing session, (2) the giving of the invocation each morning by the Chaplain to begin each day's official proceedings, (3) the monthly payment of the Chaplain for each month the Legislature sits, and (4) the printing of prayer books. The printing of prayer books has been abandoned by petitioners, was not appealed to the Court of Appeals, and is not at issue herein. The remaining acts are "legislative acts" to which common law legislative immunity applies if they are "things generally done in a session of the house by one of its members in relation to the business before it", *Kilborn v. Thompson*, 103 U. S. 168, 204 (1881), or take place in the "sphere of legitimate legislative activity", *Tenney v. Brandhove*, 341 U. S. 367 (1950), or are things "generally said or done in the house or the senate in the performance of official duties", *United States v. Brewster*, 408 U. S. 501, 512 (1972), or are an "integral part of the deliberative and communicative processes by

which Members participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house." *Gravel v. United States,* 408 U. S. 606, 625 (1972).

The acts respondent challenges meet the "legislative act" standard. The vote recommending a Chaplain occurs during a regular meeting of the Executive Board which clearly is a legislative proceeding, and is a recurring matter of business for that body. That the recommendation comes in a form of a vote is determinative of legislative immunity. *See, Kilborn v. Thompson, supra* at 204-205, *United States v. Brewster, supra* at 514. Moreover, the Executive Board's recommendation of a Chaplain, commanded by legislative rule, is an official duty of the members comprising the board. The Legislature's decision that the first step in the official proceedings of each day should be an invocation given by a Chaplain who serves as an ex officio officer respects a matter which the Nebraska Constitution has placed within the jurisdiction of the Legislature exclusively. *Gravel v. United States, supra* at 625, made operational by *Supreme Court of Virginia v. Consumer's Union, supra.*

The morning invocation of the Chaplain similarly is a "legislative act". It is speech. It occurs in the legislative chamber during official proceedings, and is in relation to the business before the Legislature. The morning prayer is commanded by the rules of the Legislature, and is thus, an official duty of the Chaplain. Since the Legislature has intended the invocation serve as the first step of the daily official proceedings, it clearly respects a mat-

ter which the Nebraska Constitution has placed exclusively within the jurisdiction of the Legislature.

The payment of the Chaplain each month is carried out by the State Treasurer at the direction of the Nebraska Legislature pursuant to the latter's statutory authority to compensate its employees and provide for its own administration. The Treasurer acts as a functionary of the Legislature in paying the Chaplain monthly. That such tasks may be more administrative or operational in nature than the other acts complained of, compels no finding that it is any less a part of the deliberative and communicative process by which legislators participate in legislative proceedings. *Gravel v. United States, supra* at 611, footnote 6.

In rejecting respondents' legislative immunity claim, The Court of Appeals relied significantly on its observation that no speech activity by any *'egislator* was at issue, nor was individual prayer by elected legislators at issue. Thereby, the court apparently presumed that legislative aides or functionaries who are not elected members of the legislative body are not entitled to claim legislative immunity in appropriate situations. This is totally contrary to expressions from this court that non-legislator aides, assistants, or officials are entitled to invoke such immunity for "legislative acts" which would have been privileged had the legislators themselves undertaken them. *Gravel v. United States, supra, Doe v. McMillan,* 412 U. S. 306 (1973).

The Court of Appeals additionally found that the deliberative process of the Legislature will not be impaired to any degree by judicial resolution of petitioner's claim, and that the prayer practice bore no substantive relation

to the process of enacting legislation, citing only *United States v. Brewster, supra,* in support therefor. This summary conclusion failed to take into account the other above-cited legislative immunity decisions of this court, some of which occurred subsequent to *Brewster* and clarified it considerably.

II.

The decision of the Court of Appeals on the merits is in direct conflict with the decision of the Supreme Court of Massachusetts, and appears to a significant degree to be in conflict with the expressions of the United States Supreme Court, on the same federal constitutional question.

In *Colo v. Treasurer and Receiver General,* 392 N. E. 2d 1195 (Mass. 1979), the Supreme Court of Massachusetts decided an action brought pursuant to the Establishment Clause to enjoin the expenditure of public funds to pay the salaries of the Massachusetts' legislative chaplains and for a declaration that the state statute authorizing such expenditures was unconstitutional. The chaplains had served for 24 and 20 years respectively. Their primary duty was to open each daily session with a brief prayer. Visiting ministers of various faiths, usually at the request of the members of the Legislature, occasionally gave the opening prayer without compensation. At the time of the action the Senate Chaplain received $9,550 annually for his services and the House Chaplain received $7,883 annually. While the specific act alleged as unconstitutional in the complaint was the expenditure of public funds, it was the underlying prayer practice which the court assessed against the purpose-effect-entanglement test of Establish-

ment Clause cases. The court concluded that no Establishment Clause violation had occurred.

The facts of and legal issues raised by the Massachusetts case are virtually identical to those presented by this action. Moreover, the Massachusetts Supreme Court specifically addressed the tenure of the chaplains independent from the underlying prayer practice, said tenure having been claimed to be an equal protection violation. While the question was resolved expressly on equal protection grounds, it clearly had been brought to the attention of the Massachusetts Supreme Court and its finding that no Establishment Clause violation had occurred can be taken as a determination that a showing of a lengthy tenure alone does not necessarily invalidate an otherwise constitutional prayer practice. So viewed, the decisions of the Massachusetts Supreme Court and the Court of Appeals for the Eighth Circuit are in direct conflict.

Numerous justices sitting on this court have had occasion to strongly suggest that legislative prayer practices such as that in Nebraska present no Establishment Clause problem. *Zorach v. Clauson*, 346 U. S. 306, 312-313 (1952); *School District of Abington v. Schempp*, 347 U. S. 203, 214, 299-300 (1963). In *McCollum v. Board of Education*, 333 U. S. 203 (1948), Mr. Justice Reed expressed this view when referring to the opening prayers offered by United States Senate Chaplains, and citing by a footnote the Senate's internal rules providing for same. *Id.* at 253. *See also*, Mr. Justice Stewart's discussion in *Engel v. Vitale*, 370 U. S. 421, 446 (1962). United States Senate rules also provide for the compensation of a chaplain in addition to his mere retention. *Murray v. Morton*, 505 F. Supp. 144 (D. D. C. 1981). Thus, while these expressions may not

have been intended by their authors as definitive conclusions, they nevertheless do reflect a degree of conflict with the Court of Appeals' decision.

III.

The merits of this case present important constitutional issues which need be addressed by this court.

Establishment Clause cases typically fall into two categories: (1) those involving governmentally supported or financed programs or activities undertaken outside the halls of government; and (2) those involving activities or conduct having religious connotations undertaken within the operation or halls of government. While this court has freely admitted that the principles of the Establishment Clause do not lend themselves to easy application from one case to another, it is nonetheless true that most of the decisions forming the core of contemporary Establishment Clause law have been handed down in cases of the first variety.

However, a trend toward increased litigation of cases such as this, representing the second variety, clearly is discernible. *See, Fox v. City of Los Angeles*, 587 P. 2d 663 (Cal. 1978) (illuminating city hall windows with a cross during Easter), *Hall v. Bradshaw*, 630 F. 2d 1018 (4th Cir. 1980) (motorist's prayer on state highway maps), and *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W. D. N. C. 1980) (police department chaplain). Application of the purpose-effect-entanglement analysis and determination of the threshold showing required to support a finding of unconstitutionality are particularly difficult in such cases because of the dearth of guidance from this court. This action presents the opportunity for the court

to take a substantial step in filling this void in its Establishment Clause pronouncements.

Moreover, while similar challenges to state legislative prayer practices around the country specifically are now ripe for litigation, the decision of the Court of Appeals for the Eighth Circuit provides virtually no guidance in resolving them. Confined in its examination by its prior decision in *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979), validating opening invocations at county board meetings, the Court of Appeals was forced to tailor its opinion specifically to the Nebraska practice, and in so doing left several critical questions certain to arise elsewhere unresolved. In holding that the retention of one particular chaplain for an "extended period of time" may transform an otherwise constitutional practice into an unconstitutional one, the court failed to give any guidance as to what constitutes an extended period of time. Further, the "viewed as a whole" analysis employed by the court was felt compelled only because respondent challenged the entire legislative prayer practice as a whole, rather than only one element thereof. This leaves unresolved, as the court hinted, the question of what analysis is proper when only one element is questioned, for example only the compensation of a legislative chaplain.

This question is hardly academic, for just such a challenge to the compensation of the federal House and Senate Chaplains is currently pending in the federal courts in the District of Columbia. The district court there, taking care to point out that the complaint challenged only the compensation of the chaplains, and not the 200 year old practice of their appointment or their morning prayers, dismissed the original complaint for lack of standing and

justiciability. *Murray v. Morton, supra.* A three-judge panel of the Court of Appeals to the District of Columbia reversed the district court's dismissal, but on May 25, 1982, a rehearing before the court en banc was ordered. Thus, it is highly likely that some, if not all, of the issues petitioners seek now to raise before this court eventually will also be raised by the parties to that action.

If the Court of Appeals' decision is correct, this court should take the opportunity to so find in a manner that will be helpful in resolving similar questions in other states. If wrongly decided, this court should take the opportunity to so find and foreclose at an early date similar lawsuits which otherwise surely can be anticipated.

IV.

The decision of the Court of Appeals on the merits was erroneous.

The Court of Appeals' decision that the Nebraska legislative prayer practice violated the Establishment Clause turned on two factors: (1) the printing of prayer books in certain years, and (2) the length of tenure of the current chaplain. Reliance on these factors by the court in its finding of unconstitutionality was clearly erroneous.

Intending not to contest the district court's judgment respecting the printing of the prayer books, but desiring review of its judgment invalidating the chaplain's compensation, petitioners appealed only that portion of the court's judgment dealing with the latter issue in reliance on Federal Rule of Appellate Procedure 28 and the rules of the Eighth Circuit Court of Appeals providing for the appeal of only a portion of a district court's judgment. Respondent's cross-appeal bore only on the propriety of the daily prayer and similarly did not put the printing of the prayer books into issue, no doubt because he had prevailed there-

on at trial. Thus, the Nebraska legislative prayer practice which was before the Court of Appeals for review was one which did not include the printing of the prayer books. In grounding its decision in large part on the printing of the prayer books, the court put the appeal in a posture not intended by the parties, thereby rendering a judgment which fails to clearly resolve the constitutionality of the specific legislative prayer practice the parties desired be addressed. In this manner, the court committed grave error.

Absent consideration of the prayer book issue, the sole feature of the Nebraska legislative prayer practice distinguishing it from what the Court of Appeals itself indicated would be a constitutional practice, is the retention and compensation of the Nebraska Chaplain for an extended period of time. For this reason, the court concluded that the purpose of the legislative prayer practice as a whole must be to advance and give preference to one religious view. However, it is noteworthy that the court did not refer at all to any evidence in the record supporting this conclusion, for none exists. The only evidence directly on this point was Chaplain Palmer's testimony that compensation had never been a condition to his service, and Executive Board Chairman Lewis' testimony that Palmer was retained for several consecutive years because it was felt he had done a good job, but would have been removed had his retention been perceived as an endorsement of his religious persuasion (*Supra,* pp. 10-11). Against this background, the determination of the Court of Appeals on this issue was clearly erroneous for relying on factual inference rather than the evidence in the record.

Additionally, the Court of Appeals determined a primary effect of Palmer's continued retention was a perception that the Legislature had an official view on re-

ligion. Again, there is absolutely no evidence in the record to support a finding of any such perception, or that it was engendered solely because of the chaplain's particular length of tenure. More importantly, even if such a perception did exist, at the very most it could amount only to a minimal accommodation of religion by the State Legislature which does not contravene the Establishment Clause. The Court of Appeals totally ignored numerous decisions of this court indicating unmistakably that indirect or incidental accommodations of religion by the state are not thereby prohibited. *Committee for Public Education v. Nyquist,* 413 U. S. 756, 760 (1973); *Lemon v. Kurtzman,* 403 U. S. 602, 604 (1971).

CONCLUSION

For the foregoing reasons, the petitioners' application for writ of certiorari should be granted.

Respectfully submitted,

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral, Petitioners,

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APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed November 24, 1980)

The plaintiff Chambers, a member of the Nebraska Legislature, brought this civil rights action against the state treasurer, the legislative chaplain, and the members of the Executive Board of the Legislative Council of the Nebraska Legislature, alleging that the giving of the morning prayer at legislative sessions, the compensation of the chaplain from public funds, and the printing of the prayers with public funds have deprived him of his First Amendment constitutional right to be free of establishment of religion. The plaintiff asks this court to enjoin the enforcement of and declare unconstitutional Legislative Rule 1, Sections 2 and 21, which provide for the election of the chaplain and prescribe his or her duties. The defendants have filed a motion, filing 11, to dismiss the plaintiff's action against them on the basis of their possession of absolute legislative immunity from actions of this sort.

It is true, as the defendants contend, that § 1983 did not abrigate the common law immunity of state legislators,

regardless of whether the relief sought in the civil rights action is damages or, as here, prospective relief. *Supreme Court of Virginia v. Consumers Union,* 48 U. S. L. W. 4620, 4623, 100 S. Ct. 1967 (1980); *Tenny v. Brandhove,* 341 U. S. 367, 376 (1951). However, the common law immunity afforded state legislators, which is construed to be similar to that afforded Congressmen under the Speech and Debate Clause, see *Consumers Union, supra,* 48 U. S. L. W. at 4623-4624, does not extend beyond the "legitimate legislative sphere." *Gravel v. United States,* 408 U. S. 606, 624-625 (1972); *Doe v. McMillan,* 412 U. S. 306, 313 (1973); and *Eastland v. United States Servicemen's Fund,* 421 U. S. 491, 503 (1975). Therefore, if it is determined that the acts of the defendant legislators in this case do not fall within the sphere of legitimate legislative activity, legislative immunity is not available. *Eastland,* supra, 421 U. S. at 503; *Green v. DeCamp,* 612 F. 2d 368, 371 (C. A. 8th Cir. 1980).

In speaking of the "legitimate legislative sphere," the Supreme Court of the United States in *Hutchinson v. Proxmire,* 443 U. S. 111, 126-127 (1978) said:

> " 'Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either house, but "only when necessary to prevent indirect impairment of such de-

liberations."' *Gravel v. United States,* 408 U. S. at 625 (quoting *United States v. Doe,* 455 F. 2d 753, 760 (Cal. 1972) (emphasis added."

Therefore, the questions presented herein are (1) whether the selection and compensation of the chaplain, the giving of prayers by the chaplain, and the recording and printing of those prayers at state expense are activities which fall within the "legitimate legislative sphere" and, if so, (2) whether the defendants Marsh and Palmer, who are not state legislators, are protected by this same legislative immunity which extends to both legislators and their aids. See *Doe v. McMillan,* 412 U. S. at 312-313.

It is apparent from the pleadings and the uncontroverted facts set out in the pretrial order that the challenged activities of the defendants do not fall within the definition of legislative activities. The selection and compensation of the chaplain and the recording and printing of the prayers given by the chaplain are in no way an "integral part of the deliberative and communicative processes" respecting the functioning of the legislative process. It is only those acts done in the course of the process of enacting legislation which are protected by legislative immunity. See *United States v. Brewster,* 408 U. S. 501, 513-516 (1972).

As noted in the plaintiff's brief in opposition to the defendants' motion to dismiss, the activities of the defendants are more akin to "enforcement" activities rather than "legislative" activities. In *Supreme Court of Virginia v. Consumers Union,* supra, the Supreme Court of the United States held that while the Virginia Supreme Court was immune from suit when acting in a *legislative* capacity (adopting rules of practice for attorneys), the court and

its chief justice were properly held liable in their *enforcement* capacities. Such an analysis is similarly applicable to the instant case, where the plaintiff is requesting not that this court enjoin the defendants from enacting Rule 1, Sections 2 and 21, but that this court enjoin the "enforcement" of those sections of the rule.

Furthermore, as observed in *United States v. Brewster,* 408 U. S. at 507, the constitutional immunity provided Congressmen was not "simply for the personal or private benefit of the Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." The defendants in their answer claim that the activities which are the subject of this action are "constitutionally permissible religious accomodations [sic] by the Legislature" and are "consistent with and protected by the rights of the members of the Legislature bestowed by the free exercise clause of the First Amendment of the Constitution of the United States." While these defenses may or may not be valid, they are indicative that the activities complained of are carried on for the "personal or private benefit" of the legislative members, rather than for the purposes of the legislative process.

Because I find that the activities of the defendant legislators do not fall within the "legitimate legislative sphere," there is no need to reach the question of whether the defendants Marsh and/or Palmer are "aids" for the purposes of legislative immunity.

IT THEREFORE HEREBY IS ORDERED that the defendants' motion to dismiss on the grounds of legislative immunity, filing 11, is denied.

Dated November 24, 1980.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Defendants.

JUDGMENT

(Filed December 24, 1980)

Pursuant to the accompanying memorandum of decision of today,

IT IS ORDERED, DECLARED AND ADJUDGED:

1. That the paying from public funds of a chaplain to open daily sessions of the Nebraska Unicameral Legislature is violative of the Establishment Clause of the First Amendment to the Constitution of the United States;

2. That the printing at state expense of prayers delivered by a chaplain at legislative sessions and distributing them to members and nonmembers of the Nebraska Unicameral Legislature contravene the Establishment Clause of the First Amendment to the Constitution of the United States;

3. That for reasons stated in the memorandum of today,

A. The defendant Frank Marsh, State Treasurer, is enjoined from expending public funds for the payment of the salary of the defendant Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral Legislature or for printing of prayers,

B. The defendant Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral, is enjoined from accepting public funds as salary as Chaplain of the Nebraska Unicameral Legislature, and

C. The action is dismissed as to the defendants other than those named in paragraphs 3A and 3B of this judgment.

Dated December 24, 1980.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Defendants.

MEMORANDUM OF DECISION

(Filed December 24, 1980)

At stake is the practice of having each day's proceedings of the Nebraska Unicameral Legislature open with a prayer by a chaplain who is paid with public funds and of having those prayers published at state expense and distributed to members and nonmembers. I conclude that the Establishment Clause of the First Amendment to the Constitution of the United States is not breached by having the prayers, but is breached by paying the chaplain to say them and by publishing and distributing them.

THE FACTS OF THE CASE

Ernest Chambers is a duly elected state senator of the Nebraska Unicameral Legislature, District 11, a citizen

and taxpayer of the State of Nebraska, and is not a Christian.

At the beginning of each session of the Nebraska Unicameral Legislature the Executive Board of the Legislative Council of the Legislature recommends the selection of court officers, one of them being called "chaplain." The selection of the chaplain is provided for by Rule 1, section 2, of the Rules of the Nebraska Unicameral, Officers and Employees, which says:

> "In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers: . . . Chaplain."

Rule 1, section 21, of the Rules states:

> "The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature."

Robert E. Palmer, one of the defendants, has been the duly selected chaplain of the Nebraska Legislature since 1965. His salary is $319.75 per month for each month the legislature is in session. The salary is paid from the general funds of the State of Nebraska and is disbursed by the State Treasurer, the defendant Frank Marsh. The prayers at each day's opening are recorded each day in the Legislative Journal. In the years 1975, 1978 and 1979 prayer books containing selected offerings given during the legislative sessions of those years were prepared pursuant to motions made and approved on the floor of the legislature. Copies of the book were distributed to the legislative membership and to other individuals upon request. Two hundred copies of the 1975 book were printed at state expense totaling $70.01; 200 copies of the 1978

book were printed at state expense totaling $260.40; and 100 copies of the 1979 book cost the state $128.15. Robert E. Palmer is and for a number of years prior to the filing of this action has been an ordained clergyman in the State of Nebraska of the Christian faith, is head of staff of Westminster Presbyterian Church in Lincoln, Nebraska, and has been since 1963.

The defendant Frank Marsh is the duly elected State Treasurer, charged with the payment of public funds as salaries to members of the legislature and particularly to the defendant Robert E. Palmer. The other defendants are members of the Executive Board of the Legislative Council of the Nebraska Unicameral Legislature and are duly elected state legislators.

Other findings of fact, developed as a result of a trial in this court, will be noted as they become appropriate to the discussion throughout this memorandum.

DISCUSSION

I.

The turmoil over the proper interplay between government and religion in America antedates the Constitution and has been continual throughout the Republic's history. The struggle has been to find that decent accommodation which allows full virility of government within its distinct sphere and full virility of religion within its distinct sphere. When the spheres have overlapped, sparks have often flown.

The Constitutional Congress in 1774 opened its session with prayer over the objections of John Jay and John

Rutledge based upon the diversity of religious preferences in that body.[1] A decade later the Constitutional Convention in Philadelphia failed to adopt Benjamin Franklin's motion for an opening prayer, but the Congress which emerged from the Convention took on the custom of the Continental Congress of having its sessions opened with prayer and has continued with that custom to this day. It is probably true that the legislatures of each of the fifty states begin each session with an opening prayer, and it is has been said that eighteen states, as well as the United States Congress, employ a chaplain or chaplains to give the prayers.[2] The constitutionality of employment of legislative chaplains by the United States Congress was challenged in *Elliott v. White*, 57 App. D. C. 389, 23 F. 2d 997 (1928), but the case was dismissed on the ground that the plaintiff, as a taxpayer, had no standing to bring the complaint under the rule of *Frothingham v. Mellon*, 262 U. S. 447 (1923).[3]

From the beginning of our country's life, friction has come between those who favor and those who disfavor having prayers in legislative chambers by paid or unpaid members of the clergy. New York, for example, had some stormy times. When the state's first constitution was adopted, it stated that all members of the clergy were ineligible for any "civil . . . office or place within this state."

For about fifty years thereafter no prayer opened the legislative sessions and no chaplains for the legislature were allowed. By statute in 1829, however, payment with civil funds of chaplains for the legislature began by both houses. So many petitions against the practice—whether against the appointments or the paying is not

known—were received that a select committee was commissioned to study the matter and report. It did so, urging abolition of any statute authorizing chaplaincies, as being unconstitutional. The legislature repealed the statute authorizing payment of the chaplains, but did not directly resolve the principle of legislative chaplaincies, as such, in the state.[4]

Nebraska's use of a chaplain for opening of its daily legislative sessions began as early as 1855, twelve years before statehood.[5] The laws of 1867 provided that the chaplain would be a salaried officer or employee of the House of Representatives with the duty of opening the session of each house of the legislature with prayer.[6] The statutes continuously made provision for a chaplain with that duty until 1973, when the present statute was enacted, declaring that the Executive Board of the Legislative Council was to make recommendations for "such other officers as may be deemed necessary."[7] The rules of the Nebraska Unicameral since then have required the Executive Board's recommending a chaplain with the duty of attending and opening each day's sitting with prayer.

II.

The Establishment Clause of the First Amendment to the Constitution of the United States is:

> "Congress shall make no law respecting the establishment of religion. . . ."

That clause is made applicable to each state by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940). For a state, then, the clause could be said to read, "A legislature shall make no law respecting the

establishment of religion." Although a broad statement misses the nooks and crannies, it may be helpful conceptually to say that the clause forbids a legislature from making any law that tends to firm up or support religion or to prefer one branch of religion or one religious belief over another. From that can begin an analysis of the specific features of the practice being challenged here.

In distinction from cases decided by the Supreme Court of the United States under the Establishment Clause, this case springs from a prayer practice that is, for the most part, an internal act—that is, one directed at the governmental unit itself or its own members. The legislature's causing invocational prayers and the prayers themselves are for the legislators' own benefit. Any hearing of the prayers by anyone other than the legislators is quite coincidental. The legislators, during the saying of the prayers, are not in their law-making stance vis-a-vis the public. Such an internal or in-house practice is not well suited to analysis by standards developed for judging practices mandated by governmental bodies upon nonmembers of the bodies, such as prayers and bible reading by or for public school children, as in *Engel v. Vitale,* 370 U. S. 421 (1962), and *Abington School District v. Schempp,* 374 U. S. 203 (1963), or posting of the Ten Commandments on the wall of a public classroom, as in *Stone v. Graham,* — U. S. —, 49 U. S. L. W. 3369 (11-17-80), or the use of funds collected from taxpayers to provide financial aid to nonpublic schools, as in *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756 (1973).

The First Amendment, through the Fourteenth, declares that state legislatures shall "make no law respect-

ing the establishment of religion." It occurs to me that not everything that a legislature does is "making" a "law." It makes a law when it decrees that *someone else* must do something. I doubt that allowing prayer for or by its own members is "making a law" in any sense. Neither what legislators do for and by themselves nor what a legislature does for and by itself with no significant impact on anyone else is the making of laws. A legislator walks to church for worship; he or she is not thereby making a law. Each of the legislators walks to church for worship—even to the same church; they are not thereby making a law. A legislator, or some legislators, or all the legislators hear a prayer in their chamber or offices; they are not thereby making a law. The legislature by majority vote invites a clergyman to give a prayer; neither the voting nor the inviting nor the giving nor the hearing of the prayer is making a law.

On this basis alone, it seems to me, I must hold that the saying of prayers, per se, in the legislative halls at the opening of each session is not prohibited by the First and Fourteenth Amendments.

Bogen v. Doty, 598 F. 2d 1110 (C. A. 8th Cir. 1979), reaches the same conclusion through the test promulgated in *Nyquist*, supra—the purpose-effect-entanglement test.[8] If the same test is put to the Nebraska legislative practice, aside from payment of the chaplain and the printing at public expense and distributing of the prayers, the result is the same as in the *Bogen* case. There is reflected by the practice a clearly secular purpose: bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner. To say that the prayers have no religious purpose would reach incred-

ibility; they do indeed have a religious purpose for the chaplain and those who choose to listen for spiritual reasons. The prayers also have a secular purpose, and it is genuine enough and strong enough to meet the constitutional measurement.

As to the effect of the practice of an invocation, it is in fact primarily secular. Irrespective of what some persons might hope for or wish to be true, the actual effect of these prayers on religion, I am persuaded by the record made in this case, is virtually nonexistent. The problem is not new. James Madison observed with respect to prayers in Congress in his day that "the daily devotions conducted by these legal Ecclesiastics [were] already degenerating into a scanty attendance and a tiresome formality."[9] The constitutional test is not, as the plaintiff asserts, whether the prayers have any effect or *could have* some effect. The test, rather, is whether the primary effect is to advance or inhibit religion. *Nyquist,* supra, 413 U. S. at 773, and *Abington,* supra, 374 U. S. at 222. The primary effect of the prayers, I find as a matter of fact, is neither to advance nor to inhibit religion. Other expressions have been used to state the "primary effect" idea. It must not have the "direct and immediate effect of advancing religion," as opposed to "a remote and incidental effect." *Nyquist,* supra, at 784, n. 39. That revision of wording, carrying perhaps a stricter test, does not change my findings here. The having of prayers in the legislature of Nebraska does not have a direct and immediate effect of advancing or inhibiting religion.

For me or any other judge to say that these particular prayers have no effect upon the spiritual life of in-

dividual senators would be presumptuous, and I do not say it. Whether a prayer is vibrant or flat or irritating or irrelevant in a privately spiritual sense is too personal for a judge to decide, except as to himself. It is at this point that I find the effect test, which was developed in other settings by the Supreme Court, awkward to apply to cases, such as this one, in which the religious act is done by and for the legislators themselves, rather than by and for someone else at the legislators' direction. The test can be adjusted to this case by saying that my assignment is to decide whether the practice of saying prayers in the legislature is advancing or inhibiting religion in religion's institutional or generic sense. As to that, I find that it is not. There is neither hurting nor helping of institutional or generic religion or any subpart of it. The same result obtains whether I rely, on the one hand, upon the opinions of the witnesses in this case as to the actual effect, or, on the other hand, upon evidence of the nature of the practice and my view of the probable consequences rationally to flow from that nature.

It is true, as the plaintiff's counsel point out, that the Supreme Court of Nebraska has said: "Prayer is always worship."[10] It is also true that the Supreme Court of the United States has said:

> "The nature of such a prayer [a solemn avowal of divine faith and supplication for the blessings of the Almighty] has always been religious. . . ."[11]

Nonetheless, neither court was declaring that prayer can have no possible effect other than one that is primarily religious or that prayer always has a direct and immediate effect of advancing religion. Praying by its nature may be *always* religious; its significant effect may be—and in the context of this case is—otherwise.

One worthy admonition for us in this area is to avoid being tightly clutched by the particular words used in a different setting by an opinion writer. Chief Justice Burger reminded us in *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970):

> ". . . In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."

The plaintiff argues that the effect test is failed if the secular effect could be achieved without using a religious means. I am not able to accept that as a flat constitutional proposition, and the plaintiff's counsel has cited no case for it, except a concurring opinion of Justice Brennan in *Abington School District v. Schempp*, supra, 374 U. S. at 281, and *Ring v. Grand Forks Public School District No. 1*, 483 F. Supp. 272, 274 (U. S. D. C. N. D. 1980). When Justice Brennan made that statement, however, he was not speaking for the court and was not speaking of prayers in legislative halls. Indeed, later in that same concurring opinion he did speak of prayers in legislative chambers and said they "might well represent no involvements of the kind prohibited by the Establishment Clause." 374 U. S. at 299. The *Ring* opinion merely cited the Brennan concurring opinion in *Abington* and does not have to do with legislative prayers or chaplains.

Distinguishing this case from the school-prayer and bible-reading cases is not difficult. I agree with the court

in that respect in *Colo v. Treasurer and Receiver General,* Mass. 392 N. E. 2d 1195, 1200 (1979):

> ". . . The purpose of a school is to teach impressionable children, many of whom, because of their ages, cannot be expected to comprehend that school-sponsored prayers are not necessarily 'lessons' to be learned like other aspects of the school program. . . . By contrast, mature legislators may reasonably be assumed to have fully formed their own religious beliefs or non-beliefs. The provision for a ceremonial moment of meditation at the opening of the . . . sessions is unlikely to advance religious belief among the legislators or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries."

See, also, *State ex rel. Finger v. Weedman,* 55 S. D. 343, 226 N. W. 348 (1929).

Moreover, the voluntariness of attendance makes a difference. The children are in school mandatorily; the senators are not in the senate mandatorily, but by choice.[12] While voluntariness is properly a consideration under the Free Exercise Clause of the First Amendment,[13] it is also a factor in assessing the effect of a practice under the Establishment Clause. See *Abington,* supra, concurring opinion of Justice Brennan, at pp. 299-300, saying:

> "Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect. . . ."

Senator Chambers, although personally offended by the practice of having the prayers and by their content, has had only minor inconvenience in absenting himself and has suffered no significant obloquy as a result of his non-attendance.

Excessive entanglement is the third part of the analysis used by the Court of Appeals in *Bogen v. Doty*, supra. As in the *Bogen* case, I think that the saying of the prayers alone entangles the state in religious affairs only nominally. The entanglement is not excessive. The court in *Bogen* cautioned the state governmental unit of the "quagmire" of excessive entanglement which may result from refusing volunteers of one religious persuasion while inviting others to give prayers. *Bogen*, 598 F. 2d at 1114. The same quagmire may be near in Nebraska, but the record is so far barren of the legislature's having entered it.

III.

Paying a salary to the chaplain and paying for and causing the printing of prayer books containing selections from the chaplain's legislative offerings, all at the taxpayers' expense, are in a different posture.[14] Directing the treasurer to pay tax money either to the chaplain or to a printer for prayer books is making a law. It is done by the legislature in its governmental capacity and imposes obligations upon nonmembers. It respects religion because it has an immediate and direct effect, substantial in scope, in advancing religion.

The process of printing and distributing books of prayers suffers an additional defect: It has no secular purpose. Whereas an invocation offers the rewards of a starting of the business of the day in a thoughtful mood and the extension of a tradition, the prayer book is devoid of any such goals, and no other secular purpose has been suggested by counsel. The use of the prayer book does not fall into a category of private meditational material

for the legislators, because distribution has been to non-legislators as well as to legislators.[15]

The Supreme Court of the United States has mapped out the road regarding payment of public funds for religious activities. The federal government cannot give unrestricted construction funds or loans to sectarian colleges, because the money could be used for a religious need.[16] A state cannot loan religiously neutral equipment, such as tape recorders and laboratory supplies to non-public schools, because the ultimate effect of the state's activity might be a religious one.[17] A state cannot return a portion of a private school's tuition fees to parents, because the ultimate effect might be a religious one.[18] The court in *Hunt v. McNair*, 413 U. S. 734, 743 (1973), said:

> "Aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting."

The chaplain's salary is no small amount, but the amount is immaterial.

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."
>
> *Everson v. Board of Education*, 330 U. S. 1, 16 (1947).

> "The imposition of taxes to pay ministers' salaries . . . aroused their indignation. It was these feelings which found expression in the First Amendment."
>
> *Id.*, at 11.

The direct and immediate religious effect of Nebraska's funding a chaplain's salary is in securing a firm

and continuing relationship with a particular cleric of one denomination to the virtual exclusion of all others for at least the several-month session of the legislature. That does not mean that no clergypersons of other religious persuasions are afforded an opportunity to offer opening prayers. Over the years the chaplain has asked others to fill in for him when he is absent. From time to time various senators have asked whether their own clergypersons might be invited, and in those instances the chaplain has always honored the requests, including one of the Jewish faith. Nevertheless, the chaplain for fifteen years has been of one faith, of one denomination, of one set of religious beliefs, embodied in one person. Use of public money to finance that arrangement—and to finance the printing for distribution to members and nonmembers of the resulting prayers—has resulted in the placing of "the power, prestige and financial support of government . . . behind a particular religious belief" or set of beliefs, which the Establishment Clause is designed to prevent. *Engel v. Vitale*, 370 U. S. 421, 431 (1963).

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."
>
> *Id.*, 370 U. S. at 435.

The result of this holding is that prayers may be had in the legislative hall, but not at public expense, and those prayers may be published and distributed, but not at public expense. That distinction is not new. James Madison, the author of the First Amendment's Religion Clauses,[19]

participated in the selection of the first Congressional chaplain but later expressed the opinion that such a chaplaincy should be at the members' own expense. He said:

> "If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense. How small a contribution from each member of Congress would suffice for the purpose? How just would it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience? Why should the expense of a religious worship be allowed for the Legislature, be paid by the public, more than that for the Executive or Judiciary branch of the Government?"
>
> Pfeffer, *Church State and Religion* (rev. ed. 1967), p. 249.

I have not dealt separately with the *appointment* of a chaplain, as distinguished from paying one. Whether the legislature can avoid advancing or inhibiting religion and excessive entanglement with religion by appointing a single chaplain on a continuing basis for year after year or even for a several-month session is problematical. I leave the matter where the Court of Appeals for the Eighth Circuit left it in *Bogen v. Doty:*

> "We would be less than candid if we did not warn the county of the quagmire it is near. Up to the time of oral argument, all persons delivering invocations were members of the Christian faith. We have no reason to believe that persons of any religious persuasions have volunteered and been turned down by the board. If in the future this should occur the board will be in a very difficult position to defend against an allegation that it is excessively entangled

in religion by giving public approval to some groups while denying it to others. We will not speculate on what, if any, criteria the county might permissibly use in selecting speakers; we only suggest that the process might prove more burdensome in time and money than is justified by the benefits."

598 F. 2d at 1114.

The members of the Executive Committee of the Legislative Council merely recommend the person to be appointed chaplain. They do not, so far as I can tell, direct payment for the chaplain or the printing of the prayer books. The lawsuit, therefore, should be dismissed as to them.

JURISDICTION OF THE COURT

The action was filed under 42 U. S. C. § 1983, and the court has jurisdiction because of 28 U. S. C. § 1343(3).

Dated December 24, 1980.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

Footnote 1/ Stokes & Pfeffer, *Church and State in the United States* (1st ed. 1964), pp. 83, 478-482.

Footnote 2/ *Colo v. Treasurer and Receiver General,* Mass. 392 N. E. 2d 1195 (1979).

Footnote 3/ Here, the plaintiff is a member of the legislature and no question has been raised of his standing to bring this action, except as discussed in footnote 14, infra.

Footnote 4/ Blau, *Cornerstones of Religious Freedom in America* (1949), pp. 136-156.

Footnote 5/ Nebraska House Journal, Council and House, First and Second Sessions 1855, shows that on Monday, January 22, "on motion of Mr. Richardson, RESOLVED that the President be authorized to invite Rev. W. Hamilton or some other clergyman, to officiate as chaplain to this body at the opening of its daily sessions."

Footnote 6/ Laws, 1867, Sections 2, 3 and 4.

Footnote 7/ Section 50-111, R. R. S. Neb. (1943, as amended).

Footnote 8/

". . . [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive governmental entanglement with religion . . ."

413 U. S. at 773

Footnote 9/ Pfeffer, *Church State and Freedom* (1967), p. 248, citing Fleet, "Madison's Detached Memorandum," William & Mary Quarterly, October, 1946, p. 559.

Footnote 10/ *Ancient & Accepted Scottish Rite of Freemasonry v. Board of County Commissioners*, 122 Neb. 586, 241 N. W. 93 (1932), quoting *People v. Board of Education*, 245 Ill. 334, 339.

Footnote 11/ *Engel v. Vitale*, supra, at 424-425.

Footnote 12/ A rule of the Nebraska Legislature requires that "every member shall be present within the Legislative Chamber during the meetings of the Legislature . . . , unless excused . . ." Unless the excuse for nonattendance is deemed sufficient by the legislature, the "presence of any member may be compelled, if necessary, by sending the Sergeant at Arms." Rule 2, section 4, Rules of the Nebraska Unicamerial January 23, 1979, plaintiff's Exhibit 4. The rule is rarely if ever used. Senator Chambers usually absents himself during the prayers and so far as the evidence shows there has been no attempt to enforce the rule. Whether he has sought to be excused is not known.

Footnote 13/ *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934).

Footnote 14/ Without otherwise addressing the issues of paying the chaplain and publishing the prayer books, the defendants argue that the plaintiff has no standing to raise those issues, presumably on the theory that he is seeking to raise them only because of his status as a taxpayer and taxpayers, as such, have no standing to challenge the expenditures. But it appears to me that Senator Chambers is challenging the entire prayer practice, including its features of payment, printing and

distribution, as a non-Christian member of the legislature, not merely as a taxpayer. He has standing.

Footnote 15/ The foreword to the published book of prayers for 1979 expresses a religious purpose only and acknowledges a goal of encouraging the use of the prayers by others who may wish to use them "as expressions of faith before God and others." It continues:

> "I have the distinct impression that a new hunger for the transcendent is abroad in our land. The vertical dimension of life is again asserting its claims. Even the more flambouyant secularism cannot fully stifle the human need to pray. We need God's power, presence and purpose in our pilgrimage, and we need the opportunity to express this need. This discovery may yet be the most significant fact as our nation begins the decade of the 1980's."

Footnote 16/ *Tilton v. Richardson*, 403 U. S. 672, 683 (1971).

Footnote 17/ *Meek pittenger*, 421 U. S. 349 (1975); *Wolman v. Walter*, 433 U. S. 229 (1977).

Footnote 18/ *Sloan v. Lemon*, 413 U. S. 825 (1973).

Footnote 19/ On September 23, 1789, Madison presented to the House of Representatives a Conference Report, recommending adoption of a stronger version of the Religion Clauses than the Senate had previous accepted. "As Irving Brant puts it, 'Of all the versions of the religious guarantee, this most directly covered the thing he was aiming at—absolute separation of church and state and total exclusion of government aid to religion.'" The House and Senate immediately adopted the amendments approved in the Conference Report, ratification followed, and the wording remains to this day. Schwartz, *The Bill of Rights: A Documentary History* (1971), Volume II, p. 1159.

EXHIBIT D

No. 81-1077

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Ernest Chambers,

Appellee,

v.

Frank Marsh, State Treasurer, and Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral,

Appellants.

Frank Lewis; John DeCamp; Robert L. Clark; Tom Fitzgerald; Steve Fowler; Howard A. Lamb; Richard D. Marvel; Loran Schmit and Jerome Warner, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral.

No. 81-1088

Ernest Chambers,

Appellant,

v.

Frank Marsh, State Treasurer, and Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral; Frank Lewis; John DeCamp; Robert L. Clark; Tom Fitzgerald; Steve Fowler; Howard A. Lamb; Richard D. Marvel; Loran Schmit and Jerome Warner, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Appellees.

Appeal and Cross-Appeal from the United States District Court for the District of Nebraska.

Submitted: October 13, 1982
Filed: April 14, 1982

Before HEANEY and STEPHENSON, Circuit Judges, and OLIVER,* Senior District Judge.

HEANEY, Circuit Judge.

The Nebraska legislature compensates a chaplain to open each legislative session with a prayer and, from time to time, collects and publishes the prayers in book form. Ernest Chambers, a Nebraska legislator, challenges this practice as violating the Establishment Clause of the First Amendment. The district court[1] enjoined some elements of the practice and upheld others, from which both Chambers and the defendants[2] appeal. We affirm in part and

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*The Honorable JOHN W. OLIVER, United States Senior District Judge for the Western District of Missouri, sitting by designation.

[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for Nebraska.

[2]The defendants are Frank Marsh, the state treasurer of Nebraska, who dispurses funds for the chaplain and for printing of the prayer books; Reverend Palmer, the legislative chaplain; and the individual legislators who comprise the Executive Board which administers the chaplaincy program. The district court enjoined the treasurer from expending funds to compensate a chaplain or to print prayer books and enjoined the chaplain from accepting compensation. It dismissed the action against the legislators.

reverse in part, and remand the matter for further action consistent with this opinion.

The essential facts are undisputed. Rule 1, sections 2 and 21, of the Rules of the Nebraska Unicameral provide that a chaplain shall be selected by the legislature through its Executive Board and that such chaplain shall attend and "open with prayer" each day of each session. Reverend Robert Palmer, an ordained Presbyterian clergyman, has been selected and has served as the sole legislative chaplain for every session since 1965. Chaplain Palmer is compensated out of general tax revenues at the rate of $320 per month for each month the legislature is in session. In 1975, 1978 and 1979, several hundred copies of prayer books were prepared and distributed pursuant to express legislative authorization, at a total cost to taxpayers of several hundred dollars. The books are comprised of the daily prayers offered in those years and have been distributed to both members and nonmembers of the legislature.

Senator Chambers is a taxpayer and citizen of Nebraska, as well as a duly elected member of the legislature. In 1979, he commenced a section 1983 action challenging the foregoing practice in its entirety—the compensation of the chaplain, the printing of the prayer books and the offering of daily prayers—arguing that the practice violates the Establishment Clause. The district court distinguished these three elements, ruling that compensation of the chaplain and financing of the prayer books are unconstitutional, but that offering daily prayers is not.

A.

Before reaching the merits of this case, we must address the defendants' claims that the action is barred by

the Tenth Amendment and by doctrines of standing, abstention and legislative immunity. We find no merit in any of these contentions.

The defendants argue that Nebraska's prayer practice is immune from federal judicial scrutiny under the Tenth Amendment, relying on *National League of Cities v. Usury*, 426 U.S. 833 (1976). *National Cities*, however, involved limits on congressional power to interfere, under the commerce clause, with certain essential state governmental functions.[3] Here, the issue is whether the First Amendment prohibits the Nebraska prayer practice, not whether Congress has interfered with state sovereignty.[4] Nothing in *National Cities* even hints that the Tenth Amendment immunizes state action from constitutional scrutiny. Indeed, if we adopted the defendants' position, the Tenth Amendment would shield state action from the entire Bill of Rights. We decline to do so.

The defendants next contend that Senator Chambers lacks standing, arguing that Chambers' taxpayer status is insufficient and that, under more general standing principles, he lacks any individualized injury that is different

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[3]It appears that the reasoning of *National Cities* is limited to congressional action under the commerce clause. *See, e. g., State of New Hampshire v. Marshall*, 616 F. 2d 240 (1st Cir. 1980).

[4]Because the present action was brought under section 1983, the defendants attempt to construe it as a federal statutory interference with state functions, as in *National Cities*. This view ignores the fact that section 1983 is essentially jurisdictional in the present context—the controlling substantive issue is whether the First Amendment bars the Nebraska practice. If it does, any resulting "interference" with the state action is mandated by the Constitution.

from the general grievance which any Nebraska citizen might assert. To support these contentions, the defendants attempt to separate the expenditure aspect of the chaplaincy from the prayers themselves, notwithstanding that defendants elsewhere argue the two elements cannot be treated separately. The defendants also attempt to construe the expenditure aspects as incidental administrative items that one lacks standing to challenge unless one is challenging a more general program of expenditures.

We think it is clear that Chambers has standing to assert his claim. The chaplain is selected and compensated for performing ostensibly one function—opening each legislative day with a prayer. Chambers challenges the formal legislative rule and established practice as a whole, not merely incidental elements of it. A taxpayer clearly has standing to challenge the expenditure foundation of such a practice because of the nexus between his taxpayer status and the Establishment Clause claim. *See Flast v. Cohen*, 392 U. S. 83 (1968); *Murray v. Buchanan*, No. 81-1301 (D. C. Cir. Mar. 9, 1982) (taxpayer standing to challenge congressional chaplaincy); *cf. Stone v. Graham*, 449 U. S. 39 (1980) (standing not even disputed). Moreover, Chambers properly asserts particularized injury in that, as a member of the legislature, he squarely confronts the prayer program on a daily basis.[5] We thus have no difficulty finding standing to assert the present claim.

---

[5]Senator Chambers asserts a significant personal impact from the practice. As a non-Christian, he vigorously objects to commencing his legislative business with allegedly "official prayers." Legislative rules require attendance at every session, but Chambers has found some of the prayers so offensive to his values that he has excused himself on occasions during the prayers.

The defendants also contend that the abstention doctrine precludes federal courts from entertaining the present action. We cannot agree. Abstention ordinarily involves deferring federal judicial action when ongoing state proceedings might obviate the need for federal relief. *See Younger v. Harris*, 401 U. S. 37 (1971). Under quite narrow circumstances, the Supreme Court has extended the comity basis of nonintervention to certain state-level executive branch functions. *See Rizzo v. Goode*, 423 U. S. 362, 379-380 (1976).[6] Federalism principles, however, do not in any manner bar the present action. There have never been any state proceedings relative to the present action, much less are any proceedings presently outstanding. Nor is the challenged prayer practice an isolated incident unrelated to official state policy. The prayer practice has been followed with the same minister for over sixteen years and the record as a whole suggests that the practice will continue unless it is held violative of the First Amendment. The present action is thus a proper assertion of a federal claim in a federal court and is fully ripe for decision. *See Zablocki v. Redhail*, 434 U. S. 374, 380 n. 5 (1978) ("[t]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy").

The defendants finally contend that the prayer practice may not be challenged because it is subject to legisla-

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[6] *Rizzo v. Goode*, 423 U. S. 362 (1976), involved an alleged pattern of police misconduct. The Supreme Court deemed federal judicial intervention improper because it found the misconduct involved isolated incidents and was not the result of official state policy. *Id.* at 367-369. Here, the alleged unconstitutional conduct is an ongoing practice pursuant to official, formal legislative policy.

tive immunity. Immunity for state legislators under section 1983 has been generally equated with the immunity accorded congressmen under the Speech and Debate Clause. *See Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 731-733 (1980). The defendants argue that the chaplain's prayers constitute immune speech and that virtually every act relating to the prayers—the rules requiring such prayers and the compensation paid therefor—are legislative acts immune from challenge. As the Supreme Court clarified in *Gravel v. United States,* 408 U.S. 606, 625 (1972):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. *Insofar as the Clause is construed to reach other matters, they must be an intergral part of the deliberative and communicative processes* by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, *the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."* [Citation omitted, emphasis added.]

Here, no speech activity by any legislator is at issue. Moreover, the deliberative process of the legislature will not be impaired to any degree by judicial resolution of the claim brought by Chambers. The prayer practice, as the district court found, bears no substantive relation to the process of enacting legislation. Nor is the independ-

ence of any individual legislator threatened by this action.[7] *See United States v. Brewster*, 401 U.S. 501 (1972). Individual prayer by legislators is not at issue. We hold that legislative immunity does not bar an otherwise proper First Amendment challenge to the formal, established practice of the Nebraska legislature by which it compensates a chaplain to open each session with prayer.

B.

The First Amendment, applicable to the states through the Fourteenth Amendment, requires that states "make no law respecting the establishment of religion." *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The defendants argue that the Nebraska prayer practice does not involve "making a law" for purposes of the Establishment Clause. The district court accepted this argument in part, hypothetically separating the prayer from the practice as a whole.

> The legislature by majority vote invites a clergyman to give a prayer; neither the inviting nor the giving nor the hearing of the prayer is making a law. On this basis alone * * * the saying of prayers, per se, in the legislative halls at the opening session is not prohibited by the First and Fourteenth Amendments.

504 F. Supp. at 588.

The present action, however, does not focus on isolated utterances or invitations during legislative sessions

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[7]We note that the district court dismissed this action as to the legislator-defendants and enjoined only the state treasurer and the chaplain. Because we do not extend the injunction to any legislators, we need not address whether such relief would be barred by legislative immunity.

and there is no reason to speculate whether prayer practices other than the one at issue here would constitute "law making" for purposes of the Establishment Clause. Here, the Nebraska legislature has adopted formal rules requiring the selection of a chaplain and the offering of prayer by such chaplain on each day of the legislative session. By express authorization, the chaplain is compensated for this service and, from time to time, the prayers are collected and published in book form. Such state sanctioned, sponsored and financed prayer activities certainly reflect sufficient "law making" to present a justiciable claim under the Establishment Clause. *See, e. g., Bogen v. Doty,* 598 F. 2d 1110 (8th Cir. 1979) (informal rule); *Voswinkel v. City of Charlotte,* 495 F. Supp. 588 (W. D. N. C. 1980) (employment contract).

We thus reach the substantive issue on its merits—does the Nebraska prayer practice violate the standard embodied in the Establishment Clause. The test for this inquiry is clear: the challenged state action must (1) serve a clearly secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. *Comm. for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756, 773 (1973).

In applying this test, the district court separated the actual prayers and chaplaincy from the compensation of the chaplain and the printing of the prayer books. Analyzing these elements independently, the court concluded that the chaplaincy and prayers are permissible, but that compensation of the chaplain and publication of the books are unconstitutional.

It might be proper to separate funding from the acts which are funded when, for example, the only disputed state involvement relates to funding.[8] Here, however, the legislative prayers are state sanctioned and, indeed, are required by formal rule. The funding is inextricably bound up with the prayers themselves. The principal function of the chaplain is to offer the daily prayers and he is compensated for performing this function. Parsing out these elements leads to what the defendants emphasized is an incongruous result: sanctioning a chaplain to offer prayers is deemed permissible but compensating him for doing so is not.

In our view, to assess whether the prayer practice has an impermissible purpose or effect, or whether it results in excessive entanglement, the established practice must be viewed as a whole. Whether the prayer practice crosses the line which separates church and state is not always easily discerned. As the Supreme Court has noted: "[t]he line of separation * * * is a blurred, indistinct and variable barrier *depending on all the circumstances of a particular relationship.*" *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971) (emphasis added). We, therefore, must analyze the various elements of Nebraska's practice as parts of a whole, not as independent unrelated actions. In so doing, we recognize that the present case falls within what might be labeled the "ceremonial prayer" category. Ceremonial recitals have a widespread role in many of our institutions: our presidents traditionally have taken their oath of office on a Bible, many federal courts

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[8] *E. g., Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (3d Cir. 1980) (expenditure for construction of a speaker's platform for the Pope).

open their sessions with a declaration that invokes the deity, and the federal congresses, both before and after adoption of the First Amendment, elected legislative chaplains who offered ceremonial prayers. *See* 1 *Journals of the Continental Congress* 26 (1774); 1 *House J.* 16,610 1, *Senate J.* 12,452. Similarly, our coinage states "In God we Trust," which has been held not to violate the First Amendment. *See Aronow v. United States,* 432 F. 2d 242 (9th Cir. 1970). None of this suggests that legislatures or other public bodies are free to promote religion while claiming to stand on ceremonial tradition. As has been noted by the Supreme Court: "While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction *may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.*" (Emphasis added.) *Abington School Dist. of Schempp,* 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

In assessing whether Nebraska's practice transcends permissible bounds, we are guided by this Court's decision in *Bogen v. Doty, supra. Bogen* involved a county board's practice of opening each of its public meetings with a prayer offered by a local member of the clergy. This was a voluntary program. Representatives of various denominations were invited to give the prayer, none were compensated and no prayers were recorded or published. This Court upheld that practice, finding that it advanced a clearly secular purpose of "establishing a solemn atmosphere and serious tone for the board meetings." *Id.* at 1113. The only issue was the offering of invocations, standing alone, and the court suggested that

"establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion." *Id.* at 1114. In also finding that the practice did not excessively entangle government and religion, the *Bogen* Court underscored that no public monies were expended and that there was no evidence the county had given preference to one religious denomination over another. *Id.* Denominational preference and use of public funds were thought to carry a serious potential for dividing persons in the political arena along religious lines, resulting in excessive entanglement between the government and religion. The *Bogen* Court, while upholding the practice as a whole, sternly warned the county "of the quagmire it is near." *Id.*

In our view, Nebraska has fallen into that quagmire with its legislative prayer practice. For sixteen years, the Nebraska legislature has selected and paid one minister, representing one denomination, to open each legislative session with prayer. The state has compensated the minister for offering such prayers. It has published his prayers for distribution to members and nonmembers of the legislature.

Such a practice violates all three elements of the constitutional test applicable here. The purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time, and for further promoting that minister's religious expressions by publishing his prayers under state auspices.

The primary effect of the practice as a whole is unmistakeably to advance religion and to give preference

to one religious view. The state has placed its official seal of approval on one religious view for sixteen years and has stood behind that seal with its funds—both to compensate the minister and to publish his prayer books. There is no merit to defendants' claim that such acts are only internal to the legislature and have no effect on the public. The prayer books have been distributed to members and nonmembers of the legislature. Moreover, the legislative sessions clearly are public meetings at which the press and general public are ordinarily present. Those who have observed or participated in Nebraska's legislative process over the last sixteen years would have to conclude that the legislature has an official view on religion which is expressed by its minister and promoted with the use of state funds.

The prayer practice also entangles the state with religion in precisely the manner warned of in *Bogen*. By using state monies to compensate the same minister for sixteen years and to publish his prayer books, the state engenders serious political division along religious lines. The result is the type of excessive entanglement which must be avoided under the First Amendment.

We therefore hold that Nebraska's legislative prayer practice, taken as a whole, is unconstitutional as a violation of the Establishment Clause of the First Amendment. We do not hold that invocations alone are unconstitutional. Indeed, *Bogen* demonstrates that some invocation practices can be constitutionally conducted. Nor do we hold that a legislative chaplaincy, even a paid chaplaincy, is *per se* unconstitutional. We recognize that a paid chaplain might be assigned functions other than offering official prayers, functions that could be deemed proper in

some contexts.[9] As indicated in *Bogen v. Doty, supra*, a chaplaincy program also might rely on volunteer members of the clergy and involve diverse theological representatives. The purpose and effect of such alternatives, however, must be examined in the light of a full record when they present an actual controversy. We cannot speculate on the constitutionality of practices that are not before us.

We decide only the questions presented here. We hold that the Nebraska legislature cannot continue to engage in its established practice by which a single minister is paid to offer legislative prayers and is retained as the exclusive source of such prayers over an extended period of time. The publishing of prayer books is similarly an impermissible part of such practice. The injunction entered below should be modified to reflect that the state is enjoined from engaging in the established practice by which it has operated the chaplaincy.

The only remaining issue involves attorneys' fees. The district court considered the plaintiff to be a partially prevailing party and awarded part of the fees requested by plaintiff's counsel. The court denied certain time and expense items that were deemed unnecessarily duplicative, which we cannot say was an abuse of discretion. The court also indicated, however, that in arriving at an overall fee, it took into account the fact that the plaintiff was only

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[9]The plaintiff concedes that tax-paid chaplains have been upheld, for example, in the context of military bases, where the nature of the government service would restrict free exercise rights if a chaplain was not provided. It is at least conceivable that the same rationale might apply in some cases to legislative service. See *Abington School Dist. v. Schempp*, 374 U. S. 203, 296-299 (1963) (Brennan, J., concurring).

partially successful. Both the plaintiff and defendants construe this as meaning that the fee award was reduced from what it would have been had the plaintiff fully prevailed. Such a reduction appears improper under *Brown v. Bathke,* 588 F. 2d 634, 638 (8th Cir. 1978), but we need not reach the issue of fee awards for partially prevailing parties. The plaintiff challenged the prayer practice as a whole and, under our holding, the state is enjoined from engaging in its present practice. The plaintiff is a fully prevailing party for purposes of a fee award. Thus, it would not be proper to reduce fees on the theory plaintiff prevailed only partially, and a new fee award should be made on remand. A determination of costs and fees on the appeal will be made upon proper motion.

The district court is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

EXHIBIT E

Nos. 81-1077 and 81-1088

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

September Term, 1981

Ernest Chambers,

Appellee/Cross-Appellant,

vs.

Frank Marsh, etc. et al.,

Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Nebraska.

On motion of appellants/cross-appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 12, 1982

Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and
ROBERT E. PALMER, Chaplain
of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Limited Certiorari Granted November 1, 1982

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and
ROBERT E. PALMER, Chaplain
of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RELEVANT DOCKET ENTRIES

December 12, 1979—Complaint with request for trial at Lincoln.

January 7, 1980—Answer of defendants.

June 19, 1980—Order (RCP) on Pretrial held 6-18-80, trial to be set by the court.

July 16, 1980—Deposition of Robert Palmer taken by plaintiff.

December 24, 1980—Memorandum of Decision (WKU).

December 24, 1980—Judgment (WKU) enjoining defendant Marsh from expending public funds for payment

of salary of defendant Palmer and defendant Palmer from accepting public funds as salary as Chaplain; and dismissing action as to other defendants.

January 6, 1981—Defendants' Notice of Appeal.

January 6, 1981—Defendants' Statement of Issues on Appeal.

January 19, 1981—Plaintiff's Notice on Cross-Appeal with certificate of service on 1-19-81.

January 19, 1981—Plaintiff's Statement of Issues.

July 22, 1981—Notice of United States Supreme Court of filing petition for certiorari.

RELEVANT PLEADINGS, JURY INSTRUCTIONS, FINDINGS, CONCLUSIONS OR OPINIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,

Defendants.

Complaint for Declaratory and Injunctive Relief

(Filed December 12, 1979)

PRELIMINARY STATEMENT

The Nebraska Unicameral employs as a salaried officer a Chaplain, who for the past 14 years has been a member of the Christian clergy in Lincoln, Nebraska. The Chaplain opens each session with a prayer, which is recorded and subsequently printed, and which prayers make no effort to be non-sectarian but have frequent references to the Christian faith. This lawsuit, a civil rights action for declaratory and injunctive relief, is brought pursuant to the establishment clause of the First Amendment of the Constitution of the United States in an effort to remove the religious content from the Nebraska Legislature and to prevent the expenditure of public funds for such purpose.

JURISDICTION

1. This court has jurisdiction over plaintiff's claim for relief pursuant to 28 U. S. C. 1343 (3) since plaintiff's claim is brought pursuant to 42 U. S. C. 1983.

PLAINTIFF

2. The plaintiff, Ernest Chambers, is a duly elected State Senator of the Nebraska Unicameral Legislature, District 11, and a citizen and taxpayer of the State of Nebraska, and who is not a Christian.

DEFENDANTS

3. Defendant Frank Marsh is the duly elected State Treasurer of the State of Nebraska, and charged with the payment of public funds as salaries to members of the Legislature and particularly to the defendant, Robert E. Palmer. Defendant Marsh is a resident of the State of Nebraska.

4. Robert E. Palmer is and, for a number of years prior to the filing of this action, has been an ordained clergyman in the state of Nebraska of the Christian faith, and since 1965 has been a duly elected officer of the Nebraska Unicameral Legislature. Defendant Palmer is a resident of the state of Nebraska.

5. The defendants Frank Lewis, John DeCamp, Robert L. Clark, Tom Fitzgerald, Steve Fowler, Howard A. Lamb, Richard D. Marvel, Loran Schmit, and Jerome Warner are all members of the Executive Board of the Legislative Council of the Nebraska Unicameral Legislature, are all duly elected state legislators, and are residents of the state of Nebraska.

FACTUAL ALLEGATIONS

6. At the beginning of each session of the Nebraska Unicameral Legislature, the Executive Board of the Legislative Council of the Legislature, elects officers. One such officer is called "Chaplain." The election of said Chaplain is provided for by Rule 1, Section 2, of the Rules of the Nebraska Unicameral, Officers and Employees, which states in part:

> In addition the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council, the following officers: * * * chaplain.

Rule 1, Section 21, of the Rules states:

> The Chaplain shall attend and open with prayer each day's sitting of the Legislature.

7. The defendant, Robert E. Palmer, has been the duly appointed Chaplain of the Legislature since 1965. He is currently the Chaplain of the Legislature and as such is an officer. He is currently drawing a salary for the year 1979 of $319.72 per month. The salary is paid from the general funds of the state of Nebraska and is disbursed by the State Treasurer, Defendant Frank Marsh.

8. It is a requirement of the legislative rules that the Chaplain attend the full session, and open each day's sitting with a prayer. These prayers are recorded as the rest of the legislative session is recorded. No effort is made by the defendant Palmer to make the prayers nonsectarian, and they have frequent references to the Christian religion. At the conclusion of each legislative year, the prayers are printed at the expense of the state of Nebraska, and are distributed.

9. The plaintiff is a member of the Unicameral and is not a Christian, and his constitutional rights are offended by the inclusion of a salaried chaplain on the staff of the Legislature, paid for by public funds, and whose prayers are recorded as part of the day's events and subsequently printed at state expense. The existence of a Chaplain and the expenditure for his salary at state expense as well as the expenditure for the transcription of his prayers and the printing of his prayers is causing the plaintiff to suffer immediate, substantial and irreparable injury, and loss of his Constitutional rights for which there is no adequate remedy at law.

CLAIM FOR RELIEF

10. Plaintiff's claim for relief is brought pursuant to 42 U. S. C. § 1983, the Civil Rights Act of 1871. The plaintiff seeks to redress the loss of his rights under the First and Fourteenth Amendments of the Constitution of the United States, which loss is being caused by defendants while acting under the color of state law. The plaintiff seeks declaratory and injunctive relief on the grounds that the defendants' practices and polcieis (sic) are causing and will continue to cause the plaintiff to suffer irreparable injury and deprivation of his constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That the court issue preliminary and permanent injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendants, members of the Executive Board of the Legislative Council of the Nebraska Unicameral Legislature, from enforcing Legisla-

tive Rule 1, sections 2 and 21, as aforesaid; enjoin the defendant Robert E. Palmer from assuming the post of Chaplain and from receiving compensation from the state of Nebraska; enjoin the defendant Frank Marsh, Treasurer of the state of Nebraska, from expending public funds for the payment of defendant Palmer's salary, or the recording or transcription of his daily prayers, and the subsequent printing and publication of his daily prayers.

2. That the court issue final declaratory relief pursuant to 28 U. S. C. § 2201 and 2202 declarig (sic) that Legislative Rule 1, Sections 2 and 21, as practiced and stated in the body of this Complaint, of the Nebraska Unicameral, be declared unconstitutional, void and unenforceable.

3. That the court award the plaintiff his costs and attorney's fees, and grant the plaintiff such additional and alternative relief as may seem just and equitable.

Dated this 11th day of December, 1979.

ERNEST CHAMBERS, Plaintiff

By: FRIEDMAN LAW OFFICES
Attorney for Plaintiff

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Plaintiff requests trial in Lincoln, Nebraska.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,

Defendants.

Answer

(Filed January 7, 1980)

COME NOW the defendants and for answer to plaintiff's complaint, admit, deny, and allege as follows:

1. Admit the allegations of paragraphs 1, 2, 3, 4 and 5 of plaintiff's complaint.

2. As to paragraph 6, deny that the Executive Board of the Legislative Council elects its own officers or those of the full Legislature, allege that the office of Chaplain is filled upon the advice and consent of the Legislature to recommendations of the Executive Board pursuant to Rule 1, Section 2 of the Rules of the Nebraska Unicameral as set out by plaintiff, and admit the substance of Rule 1, Section 21 of said Rules as set out by plaintiff.

3. As to paragraph 7, allege that the Chaplain's salary for the year of 1979 was calculated at the rate of $319.73 per month and paid only for the time the Legislature was in session, and admits that said defendant has served as Chaplain of the Legislature since 1965, is currently serving in that capacity, and is paid his salary

from the general funds of the State of Nebraska as dispersed by the State Treasurer, defendant Frank Marsh.

4. As to paragraph 8, allege that while the Rules of the Nebraska Unicameral provide that the Chaplain shall open each day's sitting of the Legislature with a prayer, the actual practice is that the prayer is given prior to the official convening of each day's sitting, and that some of these prayers are printed and distributed at state expense only to legislators or when solicited, and deny each and every other allegation contained therein.

5. As to paragraph 9, admit plaintiff is a member of the Unicameral, and deny each and every other allegation contained therein.

6. Deny that plaintiff is entitled to any temporary or permanent injunctive relief, any declaratory relief, or any costs or attorney's fees as alleged in his claim for relief and prayer for relief.

DEFENSES

7. Allege that the legislative rules providing for a Chaplain of the Nebraska Legislature, his compensation from public funds, the activities conducted by said Chaplain, and the recording, printing and distribution at state expense of the prayers delivered by said Chaplain before the opening of each day's legislative session are constitutionally permissible religious accommodations by the Legislature which are not violative of the establishment clause of the First Amendment of the Constitution of the United States, nor any of the civil rights thereby guaranteed plaintiff.

8. Allege that the selection and compensation of the Chaplain of the Nebraska Legislature, the activities conducted by said Chaplain, and the recording and printing of the prayers delivered by said Chaplain before the official opening of each day's legislative session are consistent with and protected by the rights of the members of the Legislature bestowed by the free exercise clause of the First Amendment of the Constitution of the United States.

FRANK MARSH, State Treasurer,
et al., Defendants,

By PAUL L. DOUGLAS
Attorney General

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(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,

Defendants.

Order on Pretrial Conference

(Filed June 19, 1980)

A. *Foundation for Exhibits*: Foundation for the following exhibits has been waived:

Plaintiff #1, 2, 3, and 4.

B. *Uncontroverted Facts*: The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. The plaintiff, Ernest Chambers, is a duly elected State Senator of the Nebraska Unicameral Legislature, District 11, and a citizen and taxpayer of the State of Nebraska, and who is not a Christian.

2. Defendant Frank Marsh is the duly elected State Treasurer of the State of Nebraska, and charged with the payment of public funds as salaries to members of the Legislature and particularly to the defendant, Robert E. Palmer. Defendant Marsh is a resident of the State of Nebraska.

3. Robert E. Palmer is and, for a number of years prior to the filing of this action, has been an or-

dained clergyman in the State of Nebraska of the Christian faith, and since 1965 has been a duly elected officer of the Nebraska Unicameral Legislature.

4. The defendants Frank Lewis, John DeCamp, Robert L. Clark, Tom Fitzgerald, Steve Fowler, Howard A. Lamb, Richard D. Marvel, Loran Schmit, and Jerome Warner are all members of the Executive Board of the Legislative Council of the Nebraska Unicameral Legislature, are all duly elected state legislators, and are residents of the State of Nebraska.

5. At the beginning of each session of the Nebraska Unicameral Legislature, the Executive Board of the Legislative Council of the Legislature recommends the election of certain officers. One such officer is called "Chaplain." The election of said Chaplain is provided for by Rule 1, Section 2, of the Rules of the Nebraska Unicameral, Officers and Employees, which states in part:

> In addition the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council, the following officers: * * * chaplain.

Rule 1, Section 21, of the Rules states:

> The Chaplain shall attend and open with prayer each day's sitting of the Legislature.

6. The defendant, Robert E. Palmer, has been the duly appointed Chaplain of the Legislature since 1965. He is currently the Chaplain of the Legislature and as such is an officer. The salary of the Chaplain is currently $319.75 per month for each month the Legislature is in session. The salary is paid from the general funds of the

State of Nebraska and is disbursed by the State Treasurer, defendant Frank Marsh.

7. It is a requirement of the Rules of the Nebraska Legislature that the Chaplain attend the full session and open each day's sitting with prayer. These prayers are recorded each day in the Legislative Journal. In the years 1975, 1978, and 1979, prayer books containing selected offerings given during the legislative sessions of those years were prepared pursuant to motions made and approved on the floor of the Legislature. Copies of these books were distributed to the legislative membership and to other individuals upon request. Two hundred copies of the 1975 books were printed at state expense totaling $70.01; 200 copies of the 1978 books were printed at state expense totaling $260.40; and 100 copies of the 1979 book cost the state $128.15.

C. *Controverted and Unresolved Issues:* The issues remaining to be determined and unresolved matters for the court's attention are:

1. Jurisdiction of this court over plaintiff's claim.

2. Whether defendants and each of them are persons within the meaning of Title 42 U. S. C. § 1983.

3. Whether the prayers of the Defendant Palmer at the beginning of each legislative session are violative of the Establishment Clause of the First Amendment of the Constitution of the United States.

4. Whether the prayers of the defendant Palmer are protected by the Free Exercise Clause of the First Amendment of the Constitution of the United States.

5. Whether the Rules of the Nebraska Unicameral, authorizing the office of Chaplain and directing that the opening of each legislative session with prayer are "statutes, ordinances, regulations, customs or usages" within the meaning of Title 42 U. S. C. § 1983.

6. Whether plaintiff has suffered an injury or been deprived of rights, privileges, or immunities within the meaning of Title 42 U S. C. § 1983.

D. *Witnesses:*

Ernest Chambers

Robert Palmer — For Plaintiff

Richard Marvel

Frank Lewis — For Defendants

E. *Length of Trial:* Counsel Estimate, the trial will consume not less than 1 day, not more than 2 days.

F. *Depositions and Other Discovery Documents:*

Deposition of Robert Palmer

See attached Exhibit List.

G. *Trial Date:* The case is available for trial at a time to be later set by the court.

H. Proposed findings of fact shall be submitted and exchanged at commencement of trial.

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Approved by: .....
U. S. Magistrate, U. S. District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CV79-L-294

ERNEST CHAMBERS,
Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,
Defendants.

Statement of Issues on Appeal

(Filed January 6, 1981)

COME NOW defendants Frank Marsh, State Treasurer, and Robert E. Palmer, Chaplain of the Nebraska Legislature, and pursuant to Federal Rule of Appellate Procedure 10 and Rule 11(A) (2) of the Local Rules of the United States Court of Appeals for the Eighth Circuit state the issues on their appeal of the above-captioned matter to be as follows:

1. Whether the district court erred in finding that the doctrine of legislative immunity did not bar it from

asserting jurisdiction over plaintiff's claim against defendants.

2. Whether the district court erred in failing to find that the Tenth Amendment to the United States Constitution precluded it from asserting jurisdiction over plaintiff's claim against defendants.

3. Whether the district court erred in finding that the compensation of the Chaplain of the Nebraska Legislature from public funds has violated plaintiff's civil rights guaranteed by the First Amendment to the United States Constitution.

FRANK MARSH, State Treasurer, et al., Defendants,

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Attorney General

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,

Defendants.

Statement of Issues on Appeal

(Filed January 19, 1981)

COMES NOW the plaintiff and pursuant to Federal Rules of Appellate Procedure 10, and Rule 11 (a) (2) of the local rules of the United States Court of Appeals for the Eighth Circuit, states the issues on his appeal on the above-captioned matter to be as follows:

1. Whether the District Court erred in failing to find both as a matter of law and a matter of fact that the civil rights of the plaintiff, Ernest Chambers, as protected by the Free Exercise and the Establishment clauses of the First Amendment of the United States Constitution were violated by defendants Lewis et al, by permitting daily prayer on the floor of the Nebraska Unicameral Legislature, and by permitting the appointment of a Christian chaplain on an ongoing and continuous basis.

2. Whether the District Court erred in failing to find that the defendants Palmer and Lesis (sic), et al., had created an excessive entanglement between the State of Nebraska and the Christian religion by having a Christian chaplain delivering Christian prayers on the floor of the Nebraska Unicameral Legislature for 15 years and

that the Christian religion became the unofficial or de facto state religion under those circumstances.

ERNEST CHAMBERS, Plaintiff

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and

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Attorneys for Plaintiff

(Certificate of Service omitted in printing)

DECISION OF THE TRIAL COURT

The judgment and the memorandum of decision of the District Court for the District of Nebraska, Warren K. Urbom, Chief Judge, presiding, are found as Exhibits B and C in the petition for writ of certiorari beginning at pages app. 5 and app. 7 respectively.

Therefore, the judgment and memorandum of decision are not reprinted herein.

DECISION AND ORDER IN QUESTION

The decision and order of the United States Court of Appeals for the Eighth Circuit, affirming in part and reversing in part the district court, and the Court of Appeals' order staying the issuance of the mandate pursuant to its decision and order are found as Exhibits D and E and the petition for writ of certiorari beginning on page app. 25 and app. 40 respectively.

Therefore, the decision and orders are not reprinted herein.

OTHER PARTS OF THE RECORD TO WHICH THE PARTIES WISH TO DIRECT THE COURT'S ATTENTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 79-L-294

ERNEST CHAMBERS,
Plaintiff,

vs.

FRANK MARSH, State Treasurer, et al.,
Defendants.

TRANSCRIPT OF TESTIMONY

ERNEST CHAMBERS, RESPONDENT

Direct Examination

BY MR. FRIEDMAN:

(Page 2) Q. Senator, Chambers how old are you sir?

A. 43.

Q. What's your address?

A. 3116 North 24th Street, Omaha, Nebraska.

Q. Would you give the Court a brief resume of your educational background, please?

(Page 3) A. I finished Lothrop Elementary School in Omaha. I went to Tech Senior High School, from where I graduated. I obtained a degree from Creighton University and a law degree from Creighton Law School in 1978.

Q. Do you have any other training?

A. I'm a trained barber.

Q. All right. And what is your current occupation?

A. I'm a barber, legislator.

Q. All right. When were you first elected to the Nebraska Legislature?

A. 1970 was my first term.

Q. And I take it you have been returned every election since that time, is that correct?

A. Fortunately for my constituents, unfortunately for me, yes.

Q. All right. When was the last time that you were re-elected?

A. This past November.

Q. And by what plurality?

A. About 85 percent of the vote.

Q. And which District do you come from?

A. 11th.

Q. Is that a predominantly black District in Omaha?

A. Yes, it is.

(Page 4) Q. Senator Chambers, would you describe a typical legislative day for you when the Legislature is in session?

A. Generally I try to arrive early. I'll go into the chamber, because on occasion I have to use the large volumes, many volume set dictionary. Then around 9:00 o'clock, or should the session be set to start at 10:00, I will leave the chamber because they're going to have prayer. After the prayer is over then I return. On occasion I have not been able to get out of the chamber prior to the commencement of the prayer. And on those occasions trying to be at least courteous, I would remain for the prayer.

Q. Now, we'll get into the prayer in just a moment. But during the morning session of the Legislature when, about the time that the prayer takes place, are the Senators generally (Page 5) around talking to one another about various legislative matters?

A. Yes, there's quite a bit of milling and discussion.

Q. Is that really an integral part of the legislative process?

A. For a lot of Senators it s (sic) one of the most essential parts of the day.

Q. I take it that gives you an opportunity to freely exchange ideas with Senators when they're basically supposed to be around in one group?

A. Right. In addition to that to determine the bills that are likely to actually come up. And the position that various Senators might take on them.

Q. Now, before we get into the prayers, I'd like you to describe to the Court in your own words, Senator, your own particular religious beliefs.

A. I don't believe in anything supernatural. By that I mean, magical or partaking of the nature of witch

craft where you can, by any type of incantation or ceremony, invoke the intervention of supposed or so-called spiritual forces to change things. My whole life, my system of values is based on the principle that I want to be treated a certain way. So I'll treat other people a certain way. I would have to say that I'm opposed to seeing the strong take advantage of the weak. And that would be about what my system of values would (Page 6) be based on.

Q. Would you classify yourself as a Christian?

A. No way could I be considered a Christian.

(Page 11) Q. Now, with reference to the prayers, could you state to the Court basically the time that those prayers are read by the chaplain?

A. You mean by the clock, the hour?

Q. Yes.

A. When, if we start at 9:00 or at 10:00, then when that hour arrives that's when the prayer is said.

Q. How long do they usually last?

A. About two minutes on the average.

Q. Do you excuse yourself before the prayers are said normally?

A. Yes.

Q. And where do you go?

A. Sometimes I stand outside the chamber, sometimes I go back to my office. Just wherever.

Q. Now, I take it you have been there during the time that the prayers are said, is that correct?

A. Yes.

Q. And as a matter of courtesy and custom, do the members of the Legislature stand during the prayers?

(Page 12) A. Yes, they do.

Q. And if you were to remain there during those particular prayers, would you feel compelled to stand also?

A. By the word compelled, there is no physical force or coercion that would be brought to bear on me. But since these are the people that I work with, I do stand. So there is a type of pressure that is felt when I get caught in the chamber when the prayers are said.

Q. Now, you mentioned that you would absent yourself from the legislative chambers. Would you explain to the Court why you do this?

A. Because I don't want to be there when the prayers are said.

Q. And why is that?

A. I don't believe in what the prayers deal with. I don't acknowledge a God or a Christ or the various other aspects of the Christian religion that are contained in those prayers. As a member of the Legislature I should not have to be a part of a religious ceremony when I'm there during the time that I am to represent by constituents. I feel that if I would stay there then I would be going along with the practice that I think is totally improper for a Legislature to get engaged in. I see a situation where tax money paid in by my constituents is going to pay the salary of a man who represents a specific

religion. In the same way that everybody should be free to (Page 13) practice whatever religion they want to I should be free in my official capacity from religion. So for those reasons and others I won't stay there.

Q. Does it in effect inhibit your own personal religious thought?

A. Not only that, it inhibits to some extent the relationship that I have with certain Senators there.

Q. How does that happen?

A. They know what my feelings are because I've made them very clear. And on occasion because the chaplain and I are almost in a race to see whether he'll get to the front before I can get out the back door it creates for people who think a prayer as a sacred hour somewhat of a spectacle. And they feel these types of things should not occur. That I should stay there. It's not going to hurt me. I've had these things said to me. While the prayer is going on I can think about football if I want to.

Q. Other members of the Legislature have commented to you about your absence during the prayer, is that correct?

A. Yes, they have.

Q. Have you been criticized because of it?

A. Greatly.

Q. Now, would you say that the very fact that you absent yourself creates some political divisiveness between you and the other legislators?

(Page 14) A. There's no doubt about it. Because regardless of the fact that the prayers mean nothing to me, they mean something, apparently, to the people who are there. And since we all understand how people feel toward things that are dear to them, if they see somebody taking what is dear to them in a light vein it can't help but cause a negative reaction to that person. And again, not to be too repetitive, there have been comments made to me about my failure to stay in the chamber when the prayers are said.

Q. Now, if the, if there was a moment of silence and meditation, without any religious content at all, would that trouble you at all?

A. As long as there was no characterization of that period of silence that would connect it with religion. As long as nobody tried to tell you how you should, what posture you should be in while there is silence, I would feel that that is a neutral act and people can take it or leave it. It wouldn't make any difference.

Q. Now, are you personally offended by the fact that there is a salaried Christian chaplain who delivers prayers each morning in the legislative chamber?

A. I am deeply offended by it.

Q. Can you explain that any more than you've already explained?

A. Perhaps If I were to select a religion that would (Page 15) approximate my personal views and I would eliminate from that religion all concept of a supernatural force, maybe I could relate to a Shinto priest or a Buddhist monk or a Muslim, or a native American. But I

know from having been in that Legislature for 10 years that none of these things would be tolerated. So to have everybody else's point of view degraded and put down by selecting and paying with tax money one individual representing the Christian church is highly offensive to me.

Now, I can't say what my feeling would be were I a member of one of these other religious denominations or cults. But I can speculate that if I were a member of one of these and I knew that my minister would not have the same acceptance as their Christian minister is given, not only would I be offended I might would see the need to take some affirmative action of a kind that would be considered insulting. Such as sitting at my desk, rattling papers, opening and closing books. Then if I were asked why I'm doing that I'd say what I'm doing may be is offensive to you as what you're doing is offensive to me.

(Page 16) Q. Senator Chambers, based on your experience as a legislator, have you formulated an opinion as to whether rule 1, section 21, dealing with the creation of a chaplain has a legitimate secular legislative purpose?

A. If I may be allowed to give an answer so that it's clear what I'm trying to say, the words contained in the rule all are religious by definition. A chaplain is a minister appointed to conduct public religious services. Religion in this context has to do with the recognition of the existence of a supreme being to whom you must be obedient, whom you must worship. And then the word prayer is the means you use to contact the supreme being. So since the language creates a situation where every-

thing done is religious and being done by a religious person, there is no way it can be said to be secular. There is a self contradiction here. We understand a lot of things. And define them in terms of their actions and operations. The only actions and operations of this (Page 17) chaplain are religious. So there cannot be a secular purpose ascribed to that rule and its purpose.

Q. Now, based on—could you describe to the Court a little bit of your early religious training?

A. I was reared in what I could describe as a religious straight jacket. I grew up in a church called the Church of God and Christ which is holiness or fundamentalist. It would probably be considered in these days a part of that group known as the Moral Majority. They believe in the Bible word for word as it's spoken. A fish swallowed Jonah. Literally Lot's wife was turned to salt when she was fleeing from Sodom and Gomorrah and looked back when God told her not to. Samson killed 1,000 Philistines with the jaw bone of a jackass. Jesus took three fishes and five loaves of bread and fed 5,000 people. He walked on the water, later was crucified, got up out of the ground, came back to life and went to heaven.

When I was young I accepted all those things just as they were stated, not as yarns, not as examples to illustrate a point like Aesop's fables. But I believed that in the way it was written that's the way that it was. God one day came down and took some dirt, some mud and made a man. Then he took a rib out of that man and put it in the green house and made Eve.

I believed all that just like it was written. I believed (Page 18) it to such an extent and there was a carry over

through my high school years. I read the Bible eight times from cover to cover while I was in high school looking for what they tell me in church or answers to why I'm here. Why other people are here. Why there is sickness in the world. Why children are born crippled. Why they're born deformed and retarded when there's a God who is supposed to love everybody. And in all the reading that I did I couldn't find those answers. I found this God that they had taught me about as a child telling people to go to war, to destroy a nation and leave nothing living, leave nothing standing, to salt the land so nothing will grow. Kill men, women and babies who hadn't done anything. A God who brought a flood and drowned little babies, who hadn't done anything. A God who is going to create a place called hell and put his children in where they'll burn forever.

As I began to read these things for myself from the book on which this religion was based my whole attitude changed. While I was very young I tried to believe and respect those things that people believed in, which people I respected. And until I began to read for myself I could go along with it as maybe most people do now. But when I read I changed my whole approach to it. And if that Bible and the things written pursuant to it are the basis for a religious belief in a supernatural being I had no such belief because there (Page 19) was no basis for it.

Now, that is basically what my early years were with reference to religion. I went to church all the time. I went on Sunday. I sat there all day in wool pants itching and suffering for the Lord on hot summer days when they had no air conditioning. But I didn't mind it. This is what I was taught that it was about. I'd go on Friday night. I'd go to Tuesday night prayer service why you

stay on the floor on your knees so long it feels like your bones are going to come through your skin. I watched older people. I'd hear in the Bible, have it read to me, suffer the little children to come unto me and forbid them not for of such is the kingdom of heaven. Then the way older people treated children, their attitude seemed to be, bring the little children to me and I will make them suffer. There was all this inconsistency between what I was taught and what I said.

Q. Senator Chambers, I take it you testified you were raised a rather devout, strict Christian?

A. Yes, I was.

Q. And you were acquainted with the precepts of the Christian faith?

A. Intimately. And I even considered myself a Christian at one time.

Q. Based on your experience as a Christian and based on your experience as a legislator, have you formulated an (Page 20) opinion as to whether the fact that there is a chaplain who is a Christian in the Legislature, who recites prayers which are basically Judeo-Christian and mostly Christian serves to advance the Christian religion?

A. It definitely does. That is the only purpose of these prayers and that is the only religion that is advanced.

Q. Does it in any respect put a de facto seal of approval on the Christian faith?

A. There is no question about it.

Q. Would it be, in your opinion, something that would mean that the Christian faith is really the accepted or the normal religian?

A. Sure. And that's even stated by members of the Legislature when we have debates about the chaplain. They will say these are the principles that made this country great. These are the things that America must go back to to continue to be great. When they say these things, that expression, these things, are referring to these Christian principles espoused by the chaplain. It's clear that they are creating an official religion which is backed by the Legislature which is funded by tax money.

(Page 21) *Cross-Examination*

BY MR. CRONK:

Q. Well, let me state it in another way. If the chaplain, whoever that might be, were not compensated, would you still have objection to the existence of the chaplain and the morning offerings?

A. Yes, I would. Because, again, the Legislature is saying that whoever this person is is the one officially recognized by the state as being correct. The legislative chamber is being given over to this person for the practice of his or her religion.

(Page 22) Q. If a legislative chaplain were to offer these same prayers in content as are typified by those included in the prayer book, but the chaplain was not an ordained clergyman, would you similarly object to the morning offerings?

A. Certainly. Because the effect is the same. The actions are the same. The purposes are the same. It's merely a matter of not having attached a certain label to the one who is doing it. Just like I'm trained in the law but I'm not a lawyer because I don't belong to the bar association. But (Page 23) the knowledge is nevertheless there.

Q. Okay. Is there, is it an accurate statement essentially to say then that your grievance is having a legislative chaplain deliver any morning offerings with any religious references whatsoever?

A. If the terms that you've used are taken to be defined in the way we've used them or that I've used them, then, yes. I'm opposed to that period.

Q. If the same practices were carried out by different defendants, different persons comprising the Executive Board, a different ordained clergyman serving as chaplain, your objections would still to be same?

A. Yes.

Q. So it's not dependent upon the particular defendants that you've named in the petition?

A. No.

Q. In essence, then, you seek to simply devoid the Legislature from having a legislative chaplain deliver morning offerings, go before the, or to open each day's legislative sitting as has been the practice?

A. Okay. When you say as has been the practice, you're not substituting the word offerings as being distinct from prayers, you mean the word offerings in your question to be the same as prayers?

Q. Let me just say prayers.

(Page 24) A. I'm opposed to that.

Q. Okay. Are you aware that on the reverse side, I believe, of one dollar Federal Reserve notes currently is stamped the logo or motto In God We Trust?

A. Yes. That on which it is stamped is the God in which the trust is placed.

Q. I am aware of your sentiments in that regard. In your opinion, is that logo, does it manifest the same degree of religion or religious purpose as you are concerned about in this action?

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(Page 24) A. To answer the question as you've asked it, I have to say this. When you are given this piece of money it matters not whether you look at it or not. Its value is in what it can be used for in terms of an exchange. You're not asked to submit to a certain point of view or anything else in order to spend it. So I think the placement of those words was a political gesture and has no religious content whatsoever.

Q. (By Mr. Cronk) Do you recall that when Mr. Pevar was sworn in before the Court he took an oath that ended with the phrase so help me God?

A. Sure. And that again is like abracadabra in a magic show. It does not cause anything magical to happen. It is traditional and historical and has no religious significance (Page 25) whatsoever.

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(Page 25) Q. (By Mr. Cronk) Would you agree with the fact that the affirmation, that part of the affirmation

which included the phrase so help me God contained a religious reference, that being God?

A. Sure.

(Page 33) Q. I believe you also stated that on the occasion when you have been in the chamber and when you have been present during the morning offering that the offering itself has inhibited your religious beliefs. And again I don't mean to mischaracterize your testimony. You answered that question of Mr. Friedman rather quickly.

A. What we have to realize here is that words, when I applied them to myself, will have a very specific meaning to me. That's why I stated briefly what my concepts of religion would be if I were going to apply that term to my beliefs. So what I mean by that is this. When none of my values incorporate the concepts of a supreme being and I have to stand in there and listen to somebody making such an invocation and paid by tax money, then it does, it's a negative kind of influence on me.

(Page 34) Q. When you state that the delivery of the morning offering then does inhibit your belief or have that impact on you, isn't it a correct characterization that it has that effect because of your beliefs as a matter of principle rather than as a matter of any notions you adhere to based on theistic or nontheistic religious belief?

A. Again, I know this, that the constitution guarantees me certain rights as a citizen. That one of these rights is that I can be free from the state imposing a religious ceremony on me. I know that I have a right to represent my constituents who voted for me. And when I'm prevented from having access to the chamber at all

times because of a religious ceremony it inhibits me in a lot of respects. And we can say it's because of my personal views with reference to religion or whatever it is. The totality of my being is offended by what happens in the Legislature when those prayers are said there.

(Page 36) *Redirect Examination*

BY MR. FRIEDMAN:

Q. Senator Chambers, is it true that in 1973 the Legislature actually abolished the statute that provided for the Legislature having a chaplain?

A. That's true. They repealed that law.

Q. So at one time it was grounded in state law and now it's simply grounded in legislative rule, is that correct?

A. That's correct.

Q. Your objection to the word, or to the use of a chaplain, I take it, then, is essentially grounded on the fact that chaplain by definition is a religious figure?

A. Yes.

CHARLES STEPHEN, JR.

Direct Examination

BY MR. FRIEDMAN:

(Page 39) Q. All right. And have you reviewed the prayers of Dr. Palmer that have been received into evidence?

A. I have, yes.

Q. Did you in fact review and read the deposition of Dr. Palmer that was in evidence?

A. I did.

Q. Are you basically familiar with the term chaplain?

A. Yes, I am.

Q. Would you explain what a chaplain is generally thought to be within the religious community?

A. A chaplain generally is a religious figure who operates in a, generally in a nonreligious setting, such as an (Page 40) institutional setting, a hospital, a prison.

Q. Would it be accurate that the term chaplain actually refers, though, to a religious figure by definition?

A. Yes, I thought—I meant to say that. A religious figure who operates primarily in a nonreligious setting.

Q. Are you familiar with the term prayer?

A. I am.

Q. And what, generally speaking, is a prayer in a religious setting?

A. A religious statement, spoken or unspoken, which seeks to communicate with deity or the unknown or to express one's feelings about deity or the unknown.

Q. Can prayers by definition ever been secular in nature?

A. I don't think of them as secular. I think probably not.

Q. Is the office of chaplain ever secular in nature?

A. I think a chaplain is a religious figure.

Q. Now, directing your attention to the prayers of Dr. Palmer, have you formulated an opinion based on your experience of a clergyman of 20 years as to whether these prayers are secular in nature?

A. They are clearly religious prayers.

Q. Have you formulated an opinion as to whether they are Christian in nature?

A. Roughly half of the prayers that I have seen in three booklets, roughly half of them were, had Christian (Page 41) terminology, such as Jesus Christ or Our Lord or terminology such as that, yes.

Q. And those that do not mention Jesus, are they nonetheless religious in nature?

A. Yes, they are theistic in nature and religious.

(Page 43) Q. Do you have an opinion as to whether having a chaplain in the Legislature has a secular purpose? That calls for a yes or no as to whether you have the opinion.

A. I don't think of it as having a secular purpose, no.

Q. And can you state why you have that opinion?

A. Well, a chaplain, perhaps again by definition, is a religious figure. The prime responsibility of the chaplain I believe, is to offer public prayers. Neither of these examples are secular in their purpose.

Q. Have you formulated an opinion as to whether the existence of a Christian chaplain in the Legislature advances the Christian religion? Have you formulated an opinion, yes or no?

A. It gives a certain approval, yes, to the Christian (Page 44) religion, yes.

Q. And would you explain that answer?

A. Well, by the simple fact that the Legislature, the chaplain is, and I believe always has been a Christian, there is some sort of, it seems to me, some sort of general tendency to approve of a particular prospective or point

of view in religion, and perhaps even to disapprove of others. The religious belief of the chaplain is probably representative of the religious belief of the Legislators.

Cross-Examination

BY MR. CRONK:

(Page 47) Q. To give me an idea, I think you stated, again I want to try to characterize your testimony as accurate as I can, that by definition what might make a particular utterance or (Page 48) writing a prayer would be if it were a religious statement if it seeks to communicate with deity or express feelings, one's feelings, I guess, about deity. Is that—

A. Or, I think I would extend that, if I did not, to say not necessarily deity but the unknown or the mysteries of life or the universe itself or cosmos. And I also said that I think a prayer is either, can be stated verbal or unstated.

(Page 49) Q. Let me go back to the example of the administration of the oath. Have you had occasion to witness the admission of oral oaths of public officers, presidents or whatever, inaugural addresses, which have incorporated some kind of a phrase or an affirmation with a, the religious reference of so help me God?

A. Have I had occasion to witness this? Yes, I have.

Q. Would you consider the word God to be a reference to an identifiable religious deity?

A. Yes, I would consider that to be a belief.

Q. Would you consider that utterance to be a prayer?

A. No.

Q. Could you, how would that be distinguished from a situation?

A. Well, generally I would think of prayer as more thoughtful.

Q. I'm sorry, more what?

A. Of more thoughtful. And I think of that as almost a pro (Page 50) forma statement that becomes kind of rote, a rote statement that is not, that is given without thought. The repetition of words does not make something a prayer.

Q. Would it be fair to characterize the morning offerings of the chaplain that you've scrutinized as being religious in nature on the basis of reference to deity as opposed to reference to other notions or words or language which would have religious significance? That those prayers are religious primarily by reference because they identify deity?

A. I think I would say no. I don't think they are religious primarily because they refer to deity.

Q. Okay. Why, what would be the basis that would, that has lead you to conclude that they are primarily religious?

A. Some of the prayers, I think I'm remembering them inadequately, perhaps, do not perhaps even refer to deity. But I think the mood that is created, the beauty of the statements themselves, the contemplative aspect of them, also helps to make them prayerful.

(Page 51) Q. Would you dispute that in certain public ceremonies that (Page 52) have their roots in tradition or ritual that the use of prayers or other utterances

delivered by identifiable ordained clergy persons which include religious reference and references to deity serve a purpose, or don't primarily serve the purpose of advancing religion, but simply enhance the overall ceremony with an increased solemnity or an appreciation of the genuine significance of the event?

A. Which perhaps by definition makes it religious. Because it does advance solemnity and add some sort of overall mood to the events. Perhaps this is also part of what we mean by religious.

(Page 53) Q. Based on your definition of prayer and keeping that principle in mind, is it possible that an utterance might refer to deity, readily recognizable with a particular religion or religion generally, without really advancing religion at all?

A. I think that's possible. I think it's not what we generally see as in prayers on public occasions. The purpose is to advance religion and to state the importance of religion.

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(Page 53) Q. Let's me backtrack here. Do you feel that one would be capable of composing any kind of an utterance that had incorporated within it references to deity, say God, in such a way as it would not at all advance religion?

(Page 54) A. Yes. A speech that mentioned deity in passing, certainly.

Q. Now—

A. I don't think it would. Its primary purpose is not to advance religion and it probably would not in any sense advance religion.

Q. Would it be correct to say that whether or not that indeed is the purpose or effect depends on the context of the offering, including such things as the purpose for a particular assembly, the inclinations and expectations, predispositions of those to whom it would be directed that would make it a speech rather than a prayer?

A. Well, there's a difference between a speech and a prayer and, yes, the context does make a difference. A speech that made references to diety or to Christian terminology or some sectarian terminology is one thing and a speech that uses Christian terminology to prove a point or to convince listeners is an entirely different sort of a speech, it seems to me. The same with a prayer.

(Page 56) Q. In the context of religion. What is it about a reference that affirmatively advances religion as opposed to simply refers to it in a neutered sense?

A. To people, especially people who do not have a religious foundation or do not hold religious beliefs, almost any utterance that uses religious terminology is a religious utterance and advances religion. To them I think it would be objectionable.

ROBERT E. PALMER, LEGISLATIVE CHAPLAIN

Direct Examination

BY MR. CRONK:

(Page 62) Q. Okay. And have you served as chaplain to the Nebraska Legislature since that time?

A. Since that time, yes.

Q. I wonder if you might explain briefly the circumstances surrounding your appointment to that position in 1965?

A. As best as I can recall there was a public announcement in the press to the effect that the previous chaplain had died and there was something indicating that a new chaplain was being sought. And on the suggestion of some friends I allowed my name to be submitted. There were many names at that time. And there were many people who were interviewed at that time. I think they were almost all clergy persons from the Lincoln area. And I was selected at that time. And my name, I believe, was put before the Legislature, probably (Page 63) by the Executive Board. And that's how it came about.

(Page 65) Q. (By Mr. Cronk) What is your primary responsibility as legislative chaplain, Dr. Palmer?

A. Most obvious is the morning prayers and offerings.

Q. Was the morning offering, the matter of the morning offerings ever discussed during the interview process which you were involved in prior to your selection as chaplain?

A. Not by the Executive Board.

Q. Was there any official comment at all on the matter of the morning offering, and particularly the content of the morning offerings that you would be giving?

A. No.

Q. Would you explain what you perceived then, your responsibility to be in connection with the purpose for the morning offerings and their subsequent delivery?

A. I conceived that as a result of the tradition and history of the Legislature that a part of the morning cere-

monial was the offering of a prayer or time of meditation.

Q. Have you been, ever been made aware during that interview process or at any time subsequent of any official policy statement of the Legislature or the Executive Board as to those morning offerings, other than the fact that they be offered?

(Page 66) A. No.

Q. Have you had, in your experience as an ordained clergyman, an occasion to offer prayers, invocations, or the like at other public ceremonies, such as high school baccalaureates?

A. Yes. Often.

Q. In connection with those occasions, I wonder if you might explain your basic purpose in appearing and composing the offerings or utterances in connection with those gatherings?

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(Page 66) A. I conceived of them as a ceremonial occasion. Sometimes I would be asked to give a prayer, sometimes I'd be asked to make a speech or read something.

Q. (By Mr. Cronk) Is it an accurate statement that the, your purpose in, your purpose and intent in composing and delivering the morning offerings before the Legislature is the equivalent of that in those kinds of situations?

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(Page 66) A. I'd say it's comparable.

Q. (By Mr. Cronk) I wonder if you might briefly explain the (Page 67) process—well, first of all, is there

a process or a particular manner in which you compose the morning offerings to be delivered in the legislative chamber?

A. It varies from day to day. There is a general process through which I go.

Q. Would you explain that, please?

A. There are times when I take the opportunity to compose a number of prayers, offerings, meditations, of a general nature. After it was moved by the Legislature itself, one of the Senators, that these morning offerings be included in the journal, it became necessary for me, for their inclusion, to have these written out in advance and a copy be given with the clerk preparing the journal. So because of that it became necessary for me to have them written out. I originally did not write them out in advance.

Now, what I often did was that due to conversations of the Senators, something I had seen or heard on the news in the morning, or read, the prayers would be changed a great deal from what I had written. And I had no way of having them written out exactly as they were given. So because they are printed that way does not mean they were always given that way. What I tried to do was incorporate something of the spirit and flavor and point of that particular day in the prayers. The point might be a political happening, it might be a tragedy, it might be a death, it might even be the (Page 68) weather. And I would try and incorporate that as a point of identification for the Senators and hopefully what I said would become more relevant because of that.

Q. In undertaking that process and composing a prayer on the day to day basis, what is it that you intend

to effect? What purpose do you try to carry out in the offering?

A. I could imagine the purpose varying from one day to the next. But in general, I would hope that it would be a reminder for those who were present that they were called upon and being watched in the hope that they might thereby do their very best in their deliberations and discussions and committee responsibilities for that day.

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(Page 68) Q. (By Mr. Cronk) Do you ever resort and incorporate secular writings in the composition of the morning offering?

(Page 69) A. Yes. A secular writing might be from the morning newspaper, might be from literature, might be from almost any place.

Q. Do you incorporate religious references in the composition of the morning offerings?

A. Yes, I do.

Q. Can you describe the references that, or identify the references that you use that are most commonly used?

A. I'd say under the Judeo-Christian heritage.

Q. You make references to God?

A. Yes.

Q. Is it your intent and your purpose in those references that, to the extent that they are religious references, that religion versus nonreligion or any particular religion be promoted or particularly singled out and referred to?

A. No.

Q. Would it be accurate to state that most of the references are to deity?

A. Most.

Q. And most are to deity most readily identifiable with the Christian religion?

A. With the Judeo-Christian tradition.

Q. Is there a distinction which you see in the religious references which you incorporate in your prayers or your offerings as advancing religion as opposed to not advancing (Page 70) religion?

A. I readily make a distinction.

Q. I wonder if you could explain that distinction?

A. I do not intend to advance religion by my participation in the beginning of the Legislature each day. But rather I hope thereby through that ceremony to remind all those assembled of their responsibilities as Senators through their reflection upon the realities which they hold dear and the beliefs that they may hold important which have a bearing on the decisions they make that day.

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(Page 70) Q. (By Mr. Cronk) Do you have an opinion as to what would distinguish an utterance or an offering with religious references from one that advances religion from one which simply, or as I believe you've stated, is an attempt to impress upon the Senators the importance and the significance of their responsibilities?

A. There are several criteria that I would have in answering that question.

(Page 71) Q. What would those be?

A. One would certainly be the context in which they were offered. It strikes me that the context of a Sunday morning service of worship is quite different from the context of the Nebraska Legislature at 9:00 o'clock on a Wednesday morning. I would also say a different criteria I would use would be my intent. My intent in a service of worship would be greatly different from what it is in the Legislature. And I would say the predisposition of those persons assembled would make another great difference as to whether it was advancing religion or no.

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(Page 71) Q. This notwithstanding the fact that it does incorporate references identifiable?

A. It does.

Q. During the course of your tenure as legislative chaplain, has there ever been occasion for anyone else to offer the morning prayer?

A. Yes. Often. Brought about by two things. Either my absence from the city, in which case someone else would be (Page 72) asked by me, or, two, the various Senators would from time to time ask if their clergy person might be allowed and invited. And whenever that request has come I have always honored it.

Q. Do you know—do you have knowledge of the fact that clergy persons from other faiths than Christianity have offered the offering on occasion?

A. Yes. They have.

Q. Do you know right offhand what those religions or faiths might have been?

A. One that first comes to my mind is from the Jewish faith.

Q. Have you initiated attempts during the course of your tenure to solicit other clergy persons or persons to volunteer to deliver the offering?

A. Yes. Throughout the years I have. There has been difficulty with that, however. Because of the time schedules of other clergy persons.

Q. To the best of your knowledge, has there ever been an occasion where either a member of the Legislature or somebody else has requested permission to deliver a morning offering in your stead that was denied?

A. Never has it been denied to my knowledge. Lay or clergy.

(Page 75) Q. You did testify that you do attempt to allow the individual Senators to relate to divinity as they perceive it?

A. I would hope that could happen.

Q. During the course of the offering?

A. I would hope so.

Q. But you distinguish, or that factor alone, in your opinion, does not result in those offerings being worship as you've just defined it?

A. No. Because in those prayers, which I deliver before the Legislature, perceived as offerings or however,

I try to incorporate elements which are understandable to and germane to the experience of the Senators.

For example, it is publically known and printed in the press the various religious preferences that the Senators may or may not have. And from that alone I gather something of the religious backgrounds or present religious preferences of the Senators. In the light of that it would seem more germane to their understanding of the Divine to incorporate elements out of the Judeo-Christian heritage rather than some eastern religion.

And when I incorporate the elements of the Judeo-Christian heritage or the secular heritage, I perceive these as not like a drop of water which colors, or a drop of chemical which would color an entire beaker of clear water, (Page 76) but more like, not from the point of view from chemistry but from the point of view of physics. It's laying side by side certain concepts. And so in one prayer there may be Jewish, there may be Christian, there may be secular words as such.

But I really think that these words are made religious or not religious more by the intent of the prayor, the person who is participating in the prayers by hearing them, than by the specific words themselves. I suspect some of the greatest prayers may have no reference to the Divine at all.

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(Page 76) Q. Is it your intention or purpose that the effect of your (Page 77) morning offerings be to avow any particular religious faith or faith in religion versus nonreligion?

A. I have done my very best assiduously to avoid any particular faith or sect or group of religious references, such as Presbyterian, Lutheran, Methodist, whatever it may be.

Q. During the course of your tenure as chaplain, have you had occasion to become aware of the offense to anyone's sensibilities that may have been occasioned by your morning offerings?

A. Two counts in 1980. The first account another clergy person had offered a prayer while I was absent one day. And it was pointed out to me by someone that a Jewish Senator felt that it was very explicitly Christian in its tone, in its terminology, and that it would be well if this person were not asked for that reason.

And so taking that cue, you may look at the prayers offered during 1980 from that point on, which was very early in the year, and I don't think there is any reference to Jesus or Christ in this year, because it was pointed out to me, second hand or third hand or whatever it was, that someone raised a question about another Christian minister being too explicitly Christian.

And then at least from the press, or television, from the media, it was clear to me that Senator Chambers was not in favor of these references. So these are two occasions (Page 78) when it's happened this year.

(Page 82) Q. Are you compensated, Chaplain Palmer, for your services?

A. Yes, I am.

Q. And what is the form of that compensation to you?

A. At the present time I receive a check from the state. It has varied over the years. When I was interviewed and asked to serve initially I was not told about the compensation, only that there would be remuneration. I did not know the amount. It has changed and generally became enlarged over the course of the years. By whose action, I suppose the Legislature or the Executive Board of the Legislature. Since there are amounts withheld and so on, I can't say exactly, but it comes to around $300 a month during the course of the Legislature.

Q. Payment is made by check?

A. Payment is made by check.

Q. And the check is made out to whom?

A. The check is made out to Robert E. Palmer. And it is, I believe it's signed by the State Treasurer.

Q. Does, is the check turned over by you to the church?

A. No. I receive the check from the legislation—from whoever's serving the Legislature, a clerk, often. Sometimes it's been mailed. And I would deposit that in the bank or spend it as I would any other money that I may receive.

Q. Is there any official position or policy of the church (Page 83) in connection with the services you perform for the Legislature?

A. Our church grants me freedom, as I imagine most churches do, to become involved in community activities. Whether it's this or offering a prayer to baccalaureate or serving as chaplain for some other group in the commun-

ity. It's an individual decision on my part. And it really means taking extra time out of my day to do it rather than time away from the church and its responsibilities.

Q. Is it accurate to say that you appear in furtherance of your services for the Legislature as an individual rather than as a representative of the church?

A. That's correct. That's correct.

(Page 85) *Cross-Examination*

BY MR. FRIEDMAN:

Q. Dr. Palmer, you mentioned that you were the pastor of Westminster Church in Lincoln, is that correct, sir?

A. Correct.

Q. How big a church is that?

A. Around 2600 members.

Q. And is it one of the larger Presbyterian churches in the city?

A. Yes.

(Page 86) Q. Is it also one of the larger Protestant churches in the city?

A. Yes.

Q. Are there any ministerial assemblies that you belong to?

A. I'm a member, officially, of a larger body of Presbyterian ministers, if that's what you mean.

Q. Is there a body of local ministers in Lincoln of various denominations?

A. There is a group that meets periodically for lunch. I think it's called Minister of Fellowship. I'm not certain.

Q. Do you belong to that?

A. There is no membership in that. You just go and have lunch there if you wish.

Q. You are basically aware, I take it, of the number of churches in Lincoln?

A. I have an approximate idea.

Q. Approximately how many are there?

A. If I had to make a guess, I suppose I'd guess maybe 150.

Q. All right. And of that how many of them would you call in the roughly Protestant denominations?

A. Well, some of those that I might call Protestant don't wish to be called Protestant. By that I mean, for example, is Episcopal Protestant or not? Some wish to be called, some don't.

Q. Let's rephrase then. Of the 150—

(Page 87) A. That's a guess on my part.

Q. Of the 150 churches, how many of them are not Catholic?

A. Well, I would guess safely over a hundred.

Q. All right. And do you know how many Catholic churches there are?

A. Maybe 50. I don't know.

Q. And I take it there is a Jewish Synagogue and a Temple?

A. Yes, yes.

Q. And I take it there's some other religious denominations in Lincoln too, are there not?

A. I've more or less lumped them under Protestantism in general.

Q. Are there any denominations that are not Christian and are not Jewish?

A. Conceivably.

Q. But very few, would that be correct?

A. I just don't happen to know of one.

Q. Would it be accurate to say that the majority of the religious people in Lincoln are essentially Christian in nature?

A. The majority of people in Lincoln are unchurched.

Q. The majority of people who go to church are Christian, though, are they not?

A. Yes.

Q. Of those, isn't it true that the majority of them are (Page 88) Protestant as opposed to Catholic? Would that be a correct statement?

A. That's a pretty safe guess.

Q. All right. And would you agree that those on the floor of the Legislature, there are 49 Senators?

A. Correct.

Q. And of that, is it true that the overwhelming majority of them are Christian?

A. Yes. Not by my judgment, but by stated religious preference that I've read in the press.

Q. You know that to be a fact, though, do you not?

A. If I can believe what I read, yes.

(Page 89) Q. All right. Now, would you agree that your religious beliefs, being a basically a Protestant minister, coincide roughly with the majority of the Senators in the Legislature, in the broad general scope that you are a Protestant minister as opposed to—

A. Not as a Presbyterian necessarily, but my general religious concepts probably are not greatly at variance with the majority of the Senators.

Q. So you're basically in tune with the majority?

A. I believe so.

Q. And they are in tune with you?

A. In as much as we have similar religious heritage.

(Page 90) Q. Would it be correct that the prayers or utterances that you make each morning were basically those that you perceived not to offend those of the majority that had the similar religious beliefs as you?

A. I would not say I was trying to avoid offending them so much as I was hoping to say something that they may find helpful.

Q. All right. But what you said, those kind of prayers, and we'll call what you said prayers.

A. All right.

Q. Were basically in line with the religious thoughts of the overwhelming majority of the members of the Legislature were they not?

A. I would say that's a fair surmise.

(Page 91) Q. And during that five year period approximately 48 percent of the prayers that were at least published used the word Jesus or reference to Jesus Christ, would that be correct, sir?

A. I'll take your word for it, I haven't counted them up.

(Page 92) Q. And you all know, and you're aware of the fact Senator Chambers had strong intellectual and moral convictions against listening to those prayers, are you not?

A. He made that clear.

Q. He made it clear before I ever filed this lawsuit, did he not?

A. He didn't close (sic) to be present when prayers were offered.

Q. And in deference to him, I take it you didn't stop praying?

A. I didn't stop praying.

Q. Even though you knew one of the members of the Legislature was really upset about it?

A. Even though I knew that he had beliefs which were not coincidental with mine or those of the majority of the Senators.

(Page 93) Q. I guess the question is, were you praying in a way that you believed personally and also that it was coincidental that the majority of the Senators also believed in that same manner?

A. Well, as I said before this morning's—

Q. Excuse me, sir. I believe it can be answered yes or no.

A. Then you have to repeat it.

MR. FRIEDMAN: Could we have it read?

THE COURT: Yes. The reporter may read it. (Pertinent question read by the reporter.)

A. Yes.

(Page 96) Q. Well, I suppose, let me ask you if you gave this answer. I suppose my purpose is to provide an opportunity for (Page 97) Senators to be drawn closer to their understanding of God as they understand God. In order that the Divine wisdom might be there as they conduct the business for the day. Did you say that?

A. That's another purpose, yeah, bordering on the heritage.

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(Page 97) Q. And again with reference to your purpose, do you recall in response to my questions—counsel, I'm on page 20—my purpose is, during a few moments to enable the Senators and those around them to pause for a moment and reflect upon the Divine significance of their daily doings, do you remember that?

A. Yes. Uh-huh, that's to me similar to what I said before.

Q. That's right. Once on direct examination and once on cross-examination.

A. Uh-huh.

Q. And when you say Divine, are you not referring to a religious thing?

A. To their understanding of the Divine, yes.

(Page 98) Q. What's your understanding of the Divine, sir?

A. My specific understanding, I would not force on the Senators. Because that is my own held belief as a Presbyterian minister.

Q. When you say Divine understanding you re (sic) referring nonetheless to a religious concept, are you not, sir?

A. I can't imagine talking about the Divine and not talking about a religion.

Q. The answer is yes?

A. Uh-huh.

(Page 99) Q. Now, on January 27th, 1979, I'm quoting you delivered a prayer to the Legislature and I'm going to read this to you, sir. It is good, O God, that it is not custom that brings us again into this sacred moment of prayer, but our deep sense of need. Forgive us that we talk too much and think too little. Forgive us all that we worry so often and pray so seldom. Most of all, O Lord, forgive us that helpless without thee we are yet unwilling to seek thy help. Give us (Page 100) thy grace to seek thee with the whole heart, that seeking thee we may find thee and finding thee we may love thee and

loving thee we may keep thy commandments and do thy will. Amen. Do you remember that prayer?

A. Yes. I don't remember the specific day, but—

Q. Were you engaged in a religious dialogue when you uttered those words?

A. I hope I was.

Q. And it was to God, was it not?

A. It was to God, oh, yes.

Q. And it was a religious experience for you at that time, was it not?

A. I cannot say that.

Q. It was right on the floor of the legislative chamber, was it not?

A. I hope it was a religious experience.

Q. Did you hope that the other Senators would think it would be a religious experience for them?

A. I hope they draw on those resources and find out more what God wanted for them that day.

Q. So one of your functions on the floor of the Legislature was being an instrument of the Divine, was it not?

A. I hoped I would be, as the Senators would be instruments of the Divine also.

Q. Wasn't that one of your purposes there?

(Page 101) A. By definition I think that's what a chaplain's to do, is to offer a prayer.

Q. And be an instrument of the Divine?

A. As we all are to be.

Q. As a matter of fact, as a matter of fact, didn't you say that when I'm on the floor of the Legislature I'm merely an instrument of the Divine?

A. As I hope the Senators are.

Q. You hope the Senators are an instrument of the Divine also?

A. I hope so. As they understand him. Or her.

Q. Now, is it true you believe that a chaplain in and of itself is a religious figure?

A. Certainly. Even the word has religious connotations.

Q. So you would really agree with Reverend Stephen and Senator Chambers when they say that the very word chaplain has a religious connotation?

A. Oh, yes.

Q. Would you agree with them when they say that the word prayer has religious connotation?

A. It has religious connotation.

Q. In effect you are a religious official of the Legislature, are you not?

A. I'm a chaplain of the Legislature.

Q. That's right. And that's a religious office?

(Page 102) A. By connotation.

Q. With religious responsibilities?

A. Yes.

Q. Is that correct?

A. Uh-huh.

(Page 103) Q. Would you agree that your function then is a peculiarly religious one and that you give a prayer?

A. I would say it would be a religious function by anyone who gave a prayer.

Q. Any time you give a prayer it's a religious function, isn't it?

A. If you were to offer a prayer I would have religious connotation with that.

Redirect Examination

BY MR. CRONK:

(Page 105) Q. Is it your opinion, Dr. Palmer, that a function, an activity which has religious connotations, as the word has been used here, can still serve a secular purpose?

A. It can still serve a secular purpose.

Q. Is it your testimony here that in essence that characterizes the service that you perform?

A. I would suspect that by some of the Senators it is perceived as a secular and by others it is a religious. Even though the word prayer and chaplain has a religious connotation. I mean, if I get up there and use certain words how do I know what kind of an experience that is for the people who are there in the chamber unless they tell me? Some have said it may have helped them, others

may have said it has not helped them or even offended them.

Q. Chaplain Palmer, do you believe, is it your opinion that every religious function or any activity that incorporates or manifests religious connotation advances religion?

A. No. It acknowledges religion, but not in my (Page 106) understanding does it advance religion.

Q. Your testimony then is that it is possible that a particular activity with religious connotations can amount to an acknowledgment of religion but not to go so far as to amount to an advancement of religion?

A. I would make that distinction, yes. For religion to advance I'd want to know what is happening to advance it. And I don't always see the advance of religion as a result of religious activities or activities associated with chaplains. I might wish it otherwise.

Q. Is it your intent at all in the morning offering to advance religion?

A. Not to advance religion. As I mentioned before, no one has been proselyted to any particular church because of my involvement there.

Q. This is your intent, knowing full well that the reaction of particular legislative members may be different?

A. It probably will be different. I may have, or we may have trouble here with the word advancement. To me advancement is winning converts to the faith, trying to convince someone to my point of view or another point of view. That to me is an advancement of religion.

(Page 107) *Recross-Examination*

BY MR. FRIEDMAN:

Q. Now, do I understand that the, it's your testimony that your prayers don't have a tendency to advance any religion?

A. Yes.

Q. Would you agree that by having a uniquely Christian chaplain in the Legislature it adds a certain air of officialdom to the Christian faith?

A. It could be perceived as such.

FRANK LEWIS, CHAIRMAN OF THE EXECUTIVE BOARD

Direct Examination

BY MR. CRONK:

(Page 111) Q. Do the rules of the Legislature also prescribe the responsibility of the legislative chaplain?

A. Well, I really don't think so. I think it says that there shall be a chaplain. And I think most of that has become a part of the historical precedent within our body, which is the same with some of the responsibilities of the clerk, the sergeant at arms. And most legislative bodies have that kind of tradition built up rather than in the rules. I know the Congress does that through the door keeper and some other people. It's assumed that the chaplain, and it's very clear, that one of his responsibilities is to deliver a daily prayer.

Q. That responsibility is provided by rule?

A. I believe that's correct.

Q. Are you aware of any official policy statement, declaration or any source reflecting same as to the intent or purpose of the legislative chaplain in addition to the rule?

(Page 112) A. I know of none. I know of none. The chaplain is part of our historical precedent, part of our ceremonial, I suppose would be the term, part of the legislative process.

Q. Is the chaplain compensated?

A. Yes, he is.

Q. Who has the responsibility for, or where does the authority lie for providing for the compensation of the chaplain?

A. The board provides, the Executive Board provides for compensation and levels of compensation.

Q. And what is the source of authority for the board?

A. The board has that authority under the statutes that create the Executive Board of the Legislature charging them with the responsibility of carrying out the ongoing administrative functions of the Legislature. The Executive Board is a statutory creature.

(Page 113) Q. Does the, have you, are you aware as a result of your service in the Legislature, chairmanship of the Executive Board of the Legislature, that there is a particular order of proceeding to each legislative day?

A. Always has been. Used to be 10:00 o'clock, which I favored, now they've moved it back to 9:00.

Q. By order of proceeding, I mean which particular certain steps will be taken up in order?

A. That's what I was getting at. That other was a little trivia. The Legislature starts at 9:00 o'clock. The informal part of the session really is the prayer itself. The President calls it to order. And at that time he asks the chaplain to provide the prayer. And then that's followed by really the signification of the members that they're (Page 114) present, by the presiding officer requesting that the members designate their presence by the showing of the light from their chair to indicate that they are there.

Q. Is the particular order of proceedings of each legislative day prescribed by legislative rule?

A. I believe it is. It's also prescribed by the legislative rules and also prescribed by the authority given to the Speaker of the Legislature to establish an agenda which must be followed unless altered by a vote of 30 members of the Legislature.

Q. Is it your testimony then that the opening prayer is intended to be an integral part of each day's legislative proceedings?

A. Certainly. There's five or six functions that are taken care of, usually without objection. The call to order, the prayer, the roll call, asking for amendments and clarification of the journal, the information that the clerk must read in at that particular point in time. All those are the perfunctory things as the members are arriving on the floor and getting ready for the orderly or the substantive issues of the day.

(Page 115) Q. I believe you testified that for the—restate that. Is it your understanding and is it the practice that at the beginning of each legislative session the Executive Board goes through the process of recommending officers, including a legislative chaplain?

A. That's correct.

Q. Is there a process that the Executive Board undertakes in order to accomplish that end?

A. The board's a very democratic organization. And the (Page 116) process, in past years, that's become a perfunctory thing unless there's been some objection to a particular officer. I mean, our clerk, in fact we performed that function last week for the next session. The law requires us to have those nominations in the hands of the Speaker on the first day. So the old board does that responsibility. We simply nominate for a consideration by the full membership the clerk, the assistant clerk, the sergeant at arms and the chaplain.

The process for the discussion of that is that any member has the full authority, that is a committee of equals, has the full authority to bring up at any time any item of discussion for any one of those officers if that member wished to. And it's suggested from time to time to provide for a search committee, they may do so at that time. We have found it unnecessary over the history of the Legislature to involve ourselves in a search and selection process, such as we're going through by statute now, for instance, for the ombudsman. That's a very detailed selective process.

The process there is any member may advance any name he wants to. And through the democratic processes

a majority of the members of the committee can determine what names we will forward. And that's been the process used.

Q. Is it accurate to state then that there is no formal organized process for evolving the recommendation which is followed in every particular instance at the beginning of (Page 117) each session?

A. That's correct. That's correct. There is no process. The important factor, of course, is it's a nine member board and it's absolutely necessary to have five votes.

(Page 121) Q. On the basis of your actual experience in that particular recommendation and your services as a member of the Nebraska Legislature for the past eight years, do you have an opinion as to what the purpose and intent of the legislative chaplain and morning offerings is?

A. I, as a member of that body, I know the problem of trying to get the process rolling to get to the substantive issues. That no doubt is why there are five or six or seven perfunctory items to get the issue rolling. My judgment that has always been part of the ceremonial opening of the legislative process. And that's the function that serves.

I think that provides some, for those that engage in that kind of activity, that's a quiet moment for them. That's a time to get themselves ready for that kind of a process. But it's only one part of a series of things that we do to open the day up and get down to the job that we're responsible for, and that is to make the legislative policies of the state.

Q. Are you typically present in the legislative chamber at the time the offering is made?

A. I'd say about half and half.

Q. Do you listen to them?

(Page 122) A. Sometimes.

Q. Have you ever been particularly struck with the particular morning offering in the sense of having been instilled with some sense of encouragement or some awareness of the importance of the work of the Legislature that day?

A. I don't believe that as much as a sense of concern, for instance, those that I particularly pay attention to, those when we've had a death or a tragedy within the legislative process or a family. Senator Brennan, who was a very close personal friend of mine, I'm sure that I was moved by that. Senator Keith Bond, who was a very close friend of mine from Norfolk, when he died. Maybe the death of Jerry Whelan's father. Those kind of things. But as far as a stimulus for me in terms of achieving my legislative goals and objectives with all due respects, I don't think so.

Q. Do you have a particular religious persuasion or affiliated with a particular religion?

A. I am not a member of any organized church. I suppose if you categorize me I would be a Protestant.

Q. Do you consider the morning offerings to be a religious ceremony?

A. No, I don't.

Q. Do they serve any religious purpose for you?

A. I think it's a time that you develop the order within the body of that process. But as far as being something that (Page 123) I would center on as a religious experience for me, I would think not.

Q. On the basis of your experience, your membership in the Legislature and your experience in serving as Chairman of the Executive Board, particularly in connection with the responsibilities of the board as to the legislative chaplain, do you have an opinion on why the legislative chaplain, since its inception or at least over the course of years, has been filled by an ordained clergyman and the morning offerings have employed religious references?

A. I don't know. I think anybody that's a student of the history of this country has found out that's part of our tradition. I suspect, to my knowledge, when Senator Mahoney was Chairman of the Executive Board, probably one of the most devout Catholics that I personally know, he could have appointed anyone he wanted to.

Dr. Palmer has had the job. He's done it in a very satisfactory way. Dr. Palmer is a personal friend, I think, of most of us. I certainly include him as one of my personal friends. You know, I don't see the necessity for changing. And particularly the necessity would only come if anybody thought that there was an attempt to inject some kind of a religious dogma into that area, which I have not seen.

(Page 124) *Cross-Examination*

BY MR. FRIEDMAN:

Q. Senator Lewis, you were here a few moments ago when Dr. Palmer, in response to a question on recross-examination, said that in his opinion the fact that there was a Christian chaplain did in fact add a certain air of officialdom to Christianity. You were here when he said that?

A. I was here when he said that.

Q. And would you agree that really the only clergy in the history of the Legislature has always been a Christian clergyman?

A. To my knowledge that's correct.

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(Page 124) Q. And the majority of the Legislature, legislators, according to Dr. Palmer, are of the Christian persuasion. Would you agree with that?

(Page 125) A. I think that's correct.

Q. Now, as a student of the Legislature and of the legislative process and of the members of the Legislature and in knowing that most of those people are really Christian, do you think that the majority of those Christian Senators would approve of a Buddhist monk chanting a Buddhist prayer every day for 15 years?

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(Page 125) A. I don't know about 15 years.

Q. (By Mr. Friedman) That's how long Reverend Palmer's been there.

A. I don't know that would—I don't know who would object or not. I would suspect John DeCamp would object and we'd go down the line. I think there might be some that would object to that.

Q. Don't you think it's pretty likely that most of the Legislature would object to that on a daily regular basis?

A. Oh, if we had, on, probably on a daily basis, yes.

Q. All right. And by the same token, if you had a Sioux Indian medicine man delivering an Indian chant every morning for about 15 years, do you think the Legislature would object to that?

A. As a descendant of the first Americans I wouldn't, but I (Page 126) assume the rest of them would.

Q. As a matter of fact, if you had a Rabbi delivering a Hebrew prayer every morning for 15 years, don't you suppose all those except Senator Simon and Senator Fellman might have felt a little awkward and a little embarrassed?

A. I'm not sure about that.

Q. As a practical matter, Senator Lewis, if you had a Buddhist who delivered a Buddhist chant every morning to that Legislature it would add a distinct Buddhist flavor to that legislative body, would it not?

A. I don't think that's true. I mean, from that point of view I doubt if it would be true that that would have an influence to make all of them Buddhists.

Q. It would add a flavor of Buddhism, though, would it not? Wouldn't you agree with that?

A. If you had someone there that was a Buddhist priest it would obviously have some influence of having something to do with Buddhism I guess.

(Page 127) Q. Would you say it was more recognized, at least, put that religion in a more recognized position, would it not?

A. From whose perspective?

Q. From the perspective of the public who sees a Christian or a Buddhist or a Jewish religious figure connected with the legislative body.

A. In all candor, Mr. Friedman I don't remember very much of the public viewing the prayers. Because usually at 9:00 o'clock not very many of them are there. But it—

Q. The press is there, isn't it, usually?

A. Those that rise early.

Q. The legislative chamber is open to the public, is it not?

A. Certainly. Well, the galleries are, not the chamber.

Q. Television cameras are there usually recording it for (Page 128) the educational channel?

A. I don't think they ever show the prayers.

Q. The prayers are open to the public, are they not?

A. The body is open to the public, yes. I'm saying as a practical matter the public usually is not there.

Q. The Legislature is probably the most central or one of the most central governmental institutions in the State of Nebraska, is it not?

A. Oh, yeah. I would think that's true.

Q. And you have a uniquely religious figure that's an official of that legislative body, do you not? Isn't that true, sir?

A. Oh, yeah. The chaplain is certainly—

Q. The chaplain is a religious figure, is he not?

A. No question about that.

Q. The prayers are religious prayers, are they not?

A. I assume prayers are somewhat similar to religion, if that's what your question is.

EXHIBIT 5—DEPOSITION OF
ROBERT E. PALMER, LEGISLATIVE CHAPLAIN

(Page 2) *Direct Examination*

BY MR. FRIEDMAN:

Q. Would you state your name, please, and address?

A. Robert Palmer, 1036 Fall Creek Road, in Lincoln.

Q. Reverend Palmer, my name is Herb Friedman. I'm here today representing Senator Chambers. I'm going to ask you some questions concerning the case that's been filed in the United States District Court. And if at

any time you don't understand my questions, please ask me and I will try and rephrase them. Fair enough?

(Page 3) A. Fair.

Q. Okay. You have been the Chaplain of the Legislature since 1965, is that correct?

A. Yes.

Q. All right. Can you tell me the mechanism by which you were elected or selected to be Chaplain of the Legislature?

A. I believe it was generally known, certainly through the press, that the previous Chaplain died while in office.

Q. Who was that?

A. 15 years ago. I never knew the man.

Q. Okay. How did you get in the picture?

A. Along with many other clergy persons, I met with the Executive Council, I believe, and was interviewed by them.

Q. All right.

A. And on the basis of their deliberations, I was selected.

Q. What denomination do you belong to?

A. Presbyterian Church.

Q. Do you know the denominations of any of the other people that were interviewed?

A. It would be unfair for me to say. There must have been many. 15 people, perhaps.

Q. 15 years ago, back in 1965, was this a paid position?

A. I don't honestly remember whether there was salary initially. If there was, it was a smaller amount than there is now.

(Page 4) Q. All right And what is the salary now?

A. I don't really know. I've never been told. And I've never been told how it was raised.

Q. All right. When you say how it was raised, what do you mean by that?

A. I know it's more now than it was 15 years ago. I've never made salary a point of my being asked to be Chaplain.

Q. Do you get the salary?

A. I receive a check during the course of the Legislature only, of course. Approximately a monthly basis.

Q. But the check does go to you personally, it doesn't go to your church?

A. It goes—it's made out to me.

Q. Now, when you, when the Legislature first hired you or certain Senators or the Legislature hired you, was there any conversation as to the context of the prayers or how your services would be performed?

A. You say the context of the prayers?

Q. Yes.

A. At the opening of each session.

Q. Any comments by the legislative officers as to whether or not those prayers should be Christian in denomination or nonsectarian or was anything ever mentioned about it?

A. I don't know what you mean by nonsectarian, but nothing was ever mentioned.

(Page 5) Q. When I say nonsectarian I guess not referring to any particular religious faith.

A. Nothing was ever said.

(Page 6) Q. Okay. Now, I wonder if you'd go through there and tell me which of those prayers reflect the Judeo, Jewish doctrine and which of them refer to the Christian doctrine?

A. It would take me a long time to do that.

Q. Well—

A. These are the prayers for an entire session.

Q. Well, I know. But you have told me that many of those prayers reflect the Jewish doctrine. And I'd kind of like to know which of those prayers reflect the Jewish doctrine.

A. I said the Judeo-Christian tradition.

Q. All right. Tell me which of them reflect the (Page 7) Judeo-Christian tradition. Directing your attention to January 13, 1975, on page one.

A. I was reading, for example, the first one in the book.

Q. Okay.

A. And I frankly feel this is the kind of prayer which reflects almost what I would call the American civil religion just as when you, I was asked if I promised to tell the truth so help me God. I don't think that was a sectarian comment that I made when I said I would tell the truth so help me God. I don't think there's anything sectarian in January 7th, which is as far as I've read, for example.

Q. Let's go down to January 13th.

A. All right. Well, I would say except for the last sentence, it reflects the—well, I'd say the entire prayer reflects the Judeo-Christian tradition. The only point that is specifically Christian is the last sentence. The rest I regard as frankly the kind of a prayer that could have been offered by a religious person of any faith.

Q. The last sentence, what does the last sentence say?

A. In the name of Christ Our Lord.

Q. You'd agree, I assume, that—

A. It's a Christian.

Q. Narrows it down to a Christian prayer?

A. I wouldn't say sectarian, but I'd say Christian.

Q. Perhaps we ought to define our terms so we are not going (Page 8) to quibble about semantics. When I say sectarian I'm referring to some sect, some religious sect. Now, is that what you understand that to mean?

A. A sect, I'm not certain what you mean by sect.

Q. Some particular religion.

A. A sect is not a religion. To me it would be a gross injustice to millions of people around the world were I to say that Islam is a sect or the Jewish faith is a sect or the Christian faith is a sect. In no way is that a sect by any stretch of my imagination or by any jumble of semantics I can imagine.

Q. What does nonsectarian mean?

A. Nonsectarian is one that does not promote the furtherance of any specific group, cult or division of the Judeo-Christian faith.

(Page 10) Q. Can you tell me why you frequently use the words Jesus and Christ in your prayers?

A. It strikes me that Jesus is a major figure in the Judeo-Christian heritage.

Q. I understand that. But why did you use them in your prayers?

A. Why do I use quotations from the Psalms or Moses or Abraham? Because this country is a country that recognizes the Bible.

Q. Are you willing to concede that your prayers were for the most part, Christian in tone, at least?

A. I would not say that. I would say they use the name of Jesus some times at the very end. But I would say that by and large they could be delivered by someone of any faith, by and large.

Q. Except for the references to Jesus?

A. Well, you see, Jesus is recognized by most Jews that I know as a great teacher, even a prophet. And by all Muslims that I know as that and more.

Q. All right. Has anyone at the Legislature ever suggested (Page 11) that your prayers before a session or at the beginning of a session be, have no reference to any religious figure?

A. Someone made a comment this year that they would prefer that Jesus specifically not be so prominent in the prayers. And if you will check my prayers this year, Jesus has not been mentioned.

Q. Since this lawsuit, I take it, then—

A. No. Not since the lawsuit. Someone mentioned it to me this year.

Q. 1980?

A. Uh-huh.

Q. I take it the lawsuit had nothing to do with it then?

A. This was a matter of personal privilege that someone asked me as a personal friend, in confidence. And I said I respect that. And I have not used that reference this year, to my knowledge.

Q. Someone from the Legislature?

A. I believe it was someone on the floor this year.

(Page 12) Q. Would you agree that your services, that your prayers, at least, because of the frequent reference to Jesus, add a uniquely Christian flavor to your prayers?

A. I'd say by and large they're not Christian prayers. Not the kind I would ever offer in church, no. No, they're not specifically Christian prayers. There are references to Jesus to be sure. But there are equal references to the Old Testament. As a matter of fact—

Q. Would you care to point out some of these prayers?

A. If the truth were known, there are many secular references as well.

Q. Would you care to point out in those prayers which of those are secular and which—

A. And which are what?

Q. Just which are secular and which are nonchristian?

A. Well, I don't accept those as two categories, mutually exclusive. I think that both the Judeo and the Christian heritage have influenced the secular heritage immensely. And contrary-wise the secular heritage has influenced the Judaism (Page 13) heritage. At times it's hard to separate the two. But there are many things you and I talked about in conversation that have the flare of Judaism heritage.

Q. I suppose the question, Doctor Palmer, would you care to—

A. You asked about a sectarian reference. I'm just reading the first page, which is far as I have gotten.

Q. Where have you gone now? Which exhibit?

A. The only exhibit I've opened so far, which is first session 1975, the Nebraska Unicameral 84th Legislature.

All right. If I may just say something here. I'm talking in the very second paragraph, some old faces are gone from this chamber. That is not Christian or nonchristian, it's just a comment about life. I don't see that there's anything religious or irreligious.

I talk about the invigorating climate of freedom. Talk about frankness, fortitude, faithfulness. In the very next prayer I talk about plunging into the duties of this day's sessions.

Q. And you say, O Lord, our God?

A. As I did when I was asked to tell the truth today, so help me God. Yes, that's the God I'm talking about. The same one you asked me to talk about when I promised to tell the truth.

Q. I guess the question is—

A. There's only one God.

(Page 14) Q. Not your religion or my religion—

A. No.

Q. My question is, are the prayers you offer up for the most part Christian in flavor?

A. All right. Going on to the next one here. No. They are not. The very next one here, the whole paragraph I speak about silence in the senate chamber. I say, may no short circuits be made by our lack of faith, our high professions joined to low attainments.

Q. Faith in what?

A. Well, that's up to the individual Senator to decide, not for me to propose my religious convictions. I have never, never should, never would, never will, never have infused my particular religious convictions into the minds of the Senators.

My point has been, I have used words as our constitution has used words and as the Presidents of the United States for 200 years have used words into which the individual citizens may infuse their own meanings.

For example, I'm still on the first page, may no short circuits be made by our lack of faith. Our faith in America. Our high professions. Our profession to be a good Senator. Joined to low attainment. A low attainment is not being a good Senator. Our fine words. I see nothing Christian or unchristian or Jewish or unchristian about the word word (sic). (Page 15) Hiding shabby thoughts. Shabby, I never saw that word in the Bible. Friendly faces masking cold hearts. That's the kind of thing you could read in this morning's newspaper.

So, you know, when you talk about these, basically there or basically that, if they are anything they are basically not religious. They are of the stuff of life.

Q. The second paragraph on the prayer of January 9, 1975.

A. Uh-huh.

Q. That's in quotes. It says, "what we know not, teach us," et cetera.

A. Uh-huh.

Q. Where does that come from?

A. I have an extensive file of secular writings. And it's just out of that file. I didn't think it would be appropriate to say as I read in the New York Times last Sunday, dated such and such and place such and such. This could have come out of any place.

I don't know. It certainly did not come out of any religious writing. So I'd say in a sense that is, you asked about an example of secularism, that's secularism.

Q. Now, let's move on down to the 13th of January where we talk about—and I'm really primarily concerned about the fact that you mentioned Our Heavenly Father many times. You mention God many times. You mention Christ our Lord many times.

(Page 16) A. At the beginning of each prayer and at the end of each prayer there are from time to time references to deity. And I think that seems to be what concerns you the most. On the other hand, I don't know if a prayer would be a prayer if I said, O Statehouse hear us. Is not a prayer by definition a desire to involve deity? That force which created our world and gave this country freedom somehow or other to find some relevance for those 49 men and women standing on the floor and for those assisting them roundabout so that they may find some contact with this deity, whatever their religious or irreligious persuasion or lack of persuasion may be. That, to me, is one of the functions of a Chaplain.

(Page 17) Q. Well, let's go back and talk about the flavor that these prayers portray.

A. The flavor?

Q. The flavor. Would you say that they're Christian prayers, at least in the sense that you use the word Jesus and Christ? Would that be fair to say?

A. No, that wouldn't be fair to say at all. I have my specific reference points, as you do. The majority of the prayers are not Jewish, not Christian, not Islamic. And I could go on mentioning other faiths, which I think would be pointless.

The majority of the prayers reflect more of what I don't like to use as a phrase, but I will, to clarify things, just civil religion in American. The kind of religious expressions that are common to the vast, overwhelming majority of most all Americans.

Q. What do you mean by civil religion?

A. By civil religion I mean a religion that reflects the thinking of most Americans. And is not sectarian in any sense at all.

(Page 22) Q. You haven't talked about Allah, you've talked about God and Jesus.

A. The reason I did was because I was doing my very honest (Page 23) best to represent all the people of Nebraska and the convictions of all the Senators as best I knew them in making these prayers as general as possible so as not to offend one soul. But rather to lift every soul closer to who they are as human beings, to be more sensitive to all the people they serve and to the God whom they strive to honor.

Q. Well, I take it you would at least agree that these prayers are religious in nature, then?

A. I quite don't understand that question. I, it seems to me a contradiction in terms. Are these prayers religious? Is the sunshine weather? The sunshine is weather. The clouds are weather.

Q. Well, are you answering the question yes? The prayers are religious?

A. I'm answering it by saying people are religious. The things people do are religious. I was asked today to tell the truth, that was religious.

Q. All right, Doctor—

A. So I don't know what you mean by religious in that narrow sense.

Q. Are these prayers religious in any sense of the word at all?

A. They're not irreligious.

Q. Are they religious?

A. In a very limited sense that some people might choose to (Page 24) define them as religious. I would not choose to define them.

Q. You don't choose to define them as religious but some people would define them as religious?

A. I am sure they would. For me eating food is a religious act. Washing hands is a religious act. A good Jew knows that.

Q. Tell me, Doctor, moving on to February 12, 1975, just to pick up a date, again you say, we ask for this in the name of thy loving son, Christ our Lord. How does that particular phrase, A, deal with the Judeo-Christian

heritage, and B, with the American religious Christian heritage?

A. The reason I didn't pick up my prayer book to look at it because I had the feeling you were going to make a reference to something like that. And so I'm not looking at the book. But if I were to say, as David the great King said, that does not denigrate the Christian heritage. It reflects the best of the Hebrew heritage, the Jewish heritage. And I'm thankful for that. I think I am reflecting the best of the Christian heritage in using that phrase.

Q. I think you are too. Now the question is, isn't that a Christian prayer?

A. That phrase comes out of the Christian tradition.

Q. That's right. But if you look at the entire prayer you cannot call that entirely a Christian prayer.

Q. Does it have anything to do with the Jewish religion?

(Page 25) A. Parts of that prayer do.

Q. Would you agree with the fact that the last sentence of it really adds a Christian flavor to it?

A. I would say that among the many elements that that prayer reflects, that particular phrase which you chose does reflect the Christian heritage. However, if I give an invocation at a Rotary meeting and I ask for Jesus' blessing, that doesn't mean that everything that's said and done there and eaten and consumed and drunk there is a Christian meeting.

Q. The prayer, though, becomes a Christian prayer, though, doesn't it?

A. It has an element of the Christian heritage in it.

Q. You are a Christian clergy man?

A. I personally regard myself as not only a clergy man but as a Christian.

Q. All right. You are a Christian and you are a Christian clergy man?

A. I know I'm a clergy man. I hope I'm a Christion.

Q. I think the answer to the question is yes.

A. In many ways I'm not a Christian. In many ways I'm not a Christian.

Q. How are you not a Christian?

A. Many thoughts, actions, deeds, that do not reflect the Christian ideals.

(Page 26) Q. Would you care to elaborate on that?

A. I don't think of anything offhand. But I have not always been the best person I could be.

Q. Now, would you agree that these prayers—first of all, would you agree what you say beforehand is a prayer?

A. There are many definitions of a prayer. Now, I don't know what you mean by a prayer.

Q. Let's talk about what you men by a prayer.

A. If I wake up in the morning and see a glorious sunrise, I say, oh, beautiful; that's a prayer. If I go to sleep at night and just say, thanks for a good day; that's a prayer.

Q. What about what you say to the Legislature before they open up? Is that a prayer?

A. I would say that I strive to relate the Senators and their helpers to the divine. And if that is a prayer, then I'm offering a prayer.

(Page 35) Q. All right. To kind of sum up, would it be accurate to state that your prayers are civil religious, in your opinion?

A. They partake of the elements of the American civil religion, if that's a fair phrase to use.

Q. Well, that's the phrase you used. I didn't use it.

A. I don't like to use it because it's a misleading phrase.

Q. We want this to be your testimony and I want you to tell me how you would describe these prayers. If you don't think they're Christian, what are they?

A. I didn't say they were unchristian.

Q. I didn't say they were unchristian. I said, are they Christian?

A. I would say they have elements of the Judeo-Christian heritage and they have elements of American civil religion in them.

Q. All right. Would you say that they are religious in nature?

A. They are if the Senators choose to use them as such.

Q. Well, are they religious as far as you're concerned? (Page 36) You're the one that's using the words. I am—

A. I'm the one using the words, oh, of course, I'm the one using the words. But as far as I'm concerned, they are religious only if the Senators choose to use them as such.

Q. Are they religious intents as far as you're concerned?

A. If by religious you mean enabling the Senators to contemplate the divine before they begin their day's doings I hope they would do that.

Q. And they specifically deal with, in your opinion, the divine, which means, I assume, reference to God?

A. Reference to the supreme being of the universe. However that may be understood or he may be understood or she may be understood or they may be understood by any individual Senator.

Q. Do the prayers basically refer to what we normally refer to as God?

A. If you heard the prayer you would assume that it would refer to God as you normally understand him. If a person who had no concepts of God at all, I suspect that person would refer to whatever he thought the ultimate reality of the universe was, or she.

(Page 46) *Cross-Examination*

BY MR. CRONK:

Q. I wonder if you might explain, as you perceive it, on the basis of what your experience has been, what

the expectations have been explained to you to be, if there have been any, about what your function as Legislative Chaplain is? Describe your function, your role.

A. I suspect that my best understanding of that, in a narrower sense, is that I was told by the persons who made the decision and voted on me initially, that I was to offer a prayer at the beginning of each day's session. I think that was the intent of those who asked me.

Q. Okay. I want to try and come at this from a little bit different angle and maybe it will help round out the difficulty in the characterization, which is what we have been through. What would you say the purpose, what purpose are you trying to accomplish? What is your mission in delivering every morning of the Legislature that thing, whatever it is, we might call it?

A. I suppose my purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In order that the divine wisdom might be theirs as they conduct their business for the day.

Q. Is there a link between the prayer that is given and the Legislators functioning as Legislators later that day? I (Page 47) mean is there a causal—

A. I see a relationship. I see a relationship between the two. I would hope that a decision made or a prayer offered by a Senator in the morning might carry throughout the day in their making a decision that would be more in line with their best selves.

Q. What does the label invocation mean to you as compared to prayer?

A. The word invocation, I suspect, is one of these words sometimes regarded as religious in which people assume they may invoke God's presence at a meeting. The truth of the matter is God's already there. So what they're really invoking is their perception of the divine at that meeting.

Q. Okay. For what it is that you are doing every morning, is there any distinction that you feel is meaningful between labeling that as a prayer or an invocation?

A. I would be just as happy to call it a prayer as an invocation.

Q. Okay. So there is no—

A. No.

Q. —meaningful distinction? I believe you mentioned before, and I just want to clarify this, that there have been occasions in the past throughout your tenure as Chaplain, to yield the floor to other clergy persons?

A. Whenever and every time I'm asked to do so.

(Page 48) Q. Do you have any idea about, in a typical year, how many times that might happen?

A. I would suspect that it has happened less, recently simply because previously I went out and solicited people to offer prayers. Anybody regarded as a person of religious qualification.

Q. You had a higher return when you did that?

A. I had a higher return. And the reason the return is not so high, is they found out, I found they thought they were doing a favor for me when they were

doing this. I was not trying to ask them to do a favor for me. I was trying to get a more complete representation of the various religious beliefs of the entire Legislature.

The average clergy person, whatever, is a very busy person. And they could find it as an intrusion on their time. The general assumption was it was a real sacrifice for them to come, not just a minute or two, driving to the place, finding a parking place, preparing it. And so I realized it was an imposition on their time.

Q. Has there been some reluctance, when approached, on the part of other clergy persons to fill in?

A. Yes. Genuine reluctance, particularly if I asked them for the second time. And in all frankness, most clergy persons do not live in Lincoln who represent these Senators. And I would say more often than not when I'm asked by a (Page 49) Senator, quite often Omaha Senators but others too, may my priest, my rabbi, my ministers, whatever, give a prayer on such and such a day? I always say yes. And I would say most of the time they don't come because something comes up in their schedule. It means a real commitment of gasoline to come here today.

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(Page 49) Q. Okay. I just want one more time again, and not to belabor the point, this is the last time we we'll mention it. I wonder if you just might, I'm going to ask you to characterize the nature of the content and its intended (Page 50) purpose in your morning offerings before the Legislature, in your own words.

A. I've tried to draw upon the best that I know in the Judeo-Christian tradition and the religious sensitivities of the Senators who are present, as well as in their common thinking, and general values, those concepts, those words, those phrases, those meanings, which would give a healthy flavor to their being brought closer to an understanding of what God may want them to do that day.

EXHIBIT 1—1975 PRAYER BOOK

(Page 1) **January 8, 1975**

O Lord, our God, if ever we needed Thy wisdom and Thy guidance, it is now—as our Legislature begins a new session, standing upon the threshold of a new year, fraught with so many dangerous opportunities.

Some old faces are gone from this chamber—and we remember them; other new faces have come and we welcome them; many familiar faces have returned—and we are gladdened by them.

We are grateful that somehow our beloved State continues to go on with vitality, vigor and energized faith, and we pray that in this new year we together may move on to loftier heights and nobler achievements, for the good of the people in an invigorating climate of freedom, frankness, fortitude, and faithfulness—to what we believe, to one another, and to Thee.

Amen

• • •

(Page 1) **January 13, 1975**

Our heavenly Father, in this moment of prayer, when there is silence in this senate chamber, may there not be silence in Thy presence. May our prayers be heard.

May no short circuits be made by our lack of faith, our high professions joined to low attainments, our fine words hiding shabby thoughts, or friendly faces masking cold hearts.

Out of the same old needs, conscious of the same old faults, we pray on the same old terms for new mercies and new blessings. In the name of Christ our Lord.

Amen

(Page 2) **January 14, 1975**

O God, our Father, as the battery is recharged without sound or motion, so wilt thou, in this moment of quiet, send thy spirit into the hearts and minds of each one here. With newness of life, with spiritual power, vision, and lively faith, enable them to meet all the demands which lie before them with glad anticipation, and then give them peace for the night. Through Jesus Christ our Lord.

Amen

(Page 5) **January 31, 1975**

For ties that continue to bind us together, even when the going is rough; for common purposes we continue to recognize as larger than we are, even when the business at hand taxes our patience and our constituents; for the privilege of sharing in the inspirations—as well as the frustrations—of events which make headlines . . . causing folks back home to smile, or to stop smiling; for the con-

viction we share that what helps our district helps our state; and what helps our state helps people; and what helps people is always right; for anything that may happen during today's session to deepen this conviction, and give it practical application; we now ask Your help, O Lord our God.

Amen

February 6, 1975

Creator God of the whole family of man; Father in Heaven of every family on earth; help us to understand that here in this house we are also one family.

We know that we cannot always be of one mind on the diverse issues which await our decision here, for we (Page 6) are—Republican and Democrat, Conservative and Liberal, rural and urban, male and female, Catholic and Protestant, Veteran and novice, white and black . . . nevertheless, one house, one family—its members standing side by side, each head bowed before one God, together asking that the common good rather than our individual preferences may guide us in all that we do here.

Amen

(Page 7) **February 12, 1975**

We are grateful for the lives of men and women who serve the needs of their times. The life of Abraham Lincoln speaks to us of the possibilities of our own lives. As we celebrate his birthday we would ask of Thee to help us to acquire his spirit of compassion, patience, and courage. Help us also to respond to the cries for help and guidance in our own times; this day is such a time; give

us then a right spirit for the cries of this day. We ask for this in the Name of Thy loving Son, Christ our Lord.

Amen

(Page 9) **February 25, 1975**

We acknowledge a creative and redemptive Power in events beyond our own; We seek forgiveness for whatever of our past that never should have been; We ask strength for whatever of the present is as it should be; We desire guidance toward those hopes for the future which conform to the Creator's design. O Lord our God: Forgive us, strengthen us, guide us for our own sake, and for the sake of the people we represent.

Amen

(Page 15) **March 17, 1975**

Have you ever wondered why we fold our hands when we pray? May I suggest the reason:

We fold our hands when we pray. The right and the left of us. The best and the worst in us. Heaven and earth about us. All come together when we fold our hands and pray. We fold our hands when we pray. The clenched fist of anger, the stubborn thumb of bitterness, the pointing (Page 16) finger of scorn, and relax together when we fold our hands and pray. We fold our hands when we pray. Within the folded hands fingers cross fingers. Our crosses and the Cross. All aware together when we fold our hands and pray. From the folded hands from the heart within. From the God above, from the Cross of Christ: Love—forgiveness—peace all bless together when we fold our hands and pray.

Amen

(Page 17) **March 24, 1975**

O Lord our God: we are aware of the things which You did in the fullness of times to make this a Holy Week; but we may not be aware of all the things we should be doing in our own time to keep it Holy.

By the example and spirit of the Holy One who once walked in our midst, inspire us.

May the days ahead when we recall His crucifixion and resurrection strengthen our faith, and issue in special blessing for all.

May the peace and joy of the Easter Season be upon Nebraska's representatives, and upon all they serve.

Amen

(Page 19) **April 4, 1975**

O Lord our God: we in this House want to become friends and advocates of every plan and program which will enable men and women and children to live better, easier, fuller lives; therefore we ask for imagination able to interpret statistical records and research papers in terms of the sufferings, the longings, the real life needs of human beings.

May it become the personal creed of each legislator never to seek anything for self which might short-change others, but always to seek for others the same good life that is sought for self. Our prayer is offered in the name of Jesus—our Friend, our Saviour, our Example, our Guide.

Amen

EXHIBIT 2—1977-78 PRAYER BOOK

(Page 1) **January 5, 1977**

Dear Lord and Father, if ever we needed Your wisdom and guidance it is now as our Legislature begins a new session standing upon the threshold of a new year, filled with so many wonderful and dangerous opportunities. Although we have been organized as a Legislature for 40 years, our traditions go back to the first dreams of democracy, and our thoughts stretch forward with high hopes for what we may yet accomplish in the future.

Some familiar faces are gone from this chamber, and we remember them; other new faces have come, and we welcome them; many familiar faces have returned, and we are gladdened by them.

We are grateful that somehow our beloved State continues to move forward with vitality, vigor and energized faith, and we pray that in 1977 we together may move on to loftier heights and nobler achievements, for the good of the people in an invigorating climate of freedom, frankness, fortitude and faithfulness—to what we believe to one another, and to You the God and Father of us all. Amen.

January 11, 1977

Our heavenly Father, in this moment of prayer, when there is silence in this senate chamber, may there not be silence in Thy presence. May our prayers be heard.

May no short circuits be made by our lack of faith, our high professions joined to low attainments, our fine words hiding shabby thoughts, or friendly faces masking cold heart.

Out of the same old needs, conscious of the same old faults, we pray on the same old terms for new mercies and new blessings. In the name of Christ our Lord. Amen.

February 1, 1977

We know, our Father, that there is a time to speak and a time to keep silent. Help us to tell the one from the other. When we should speak, give us the courage of our convictions. When we should keep silent, restrain us from speaking, lest, in our desire to appear wise, we give ourselves away. Teach us the sacraments of silence, that we may use them to know ourselves, and, above all, to know thee. Then shall we be wise. Through Jesus Christ our Lord. Amen.

(Page 2) **February 7, 1977**

Eternal Father, we ask thy divine guidance, strength, and sense of purpose be given to the members of this Legislature. Although they have great diversity within themselves and the people they represent, may they not strive to be individualistic comets flashing across the sky, but stars which are united into a constellation which gives a pattern and unity in the midst of diversity while amplifying their indivual convictions, may they ever remember they are part of the team working together to win the game for the benefit of the people of this state. In our Lord's name. Amen.

(Page 3) **March 4, 1977**

Hurried affairs of the day with all the demands and pressures that come upon us we forget Thee, and in our forgetfulness we are successful in denying Thy will.

Watch over us then, we pray, especially in these sessions of our legislative session. Guide us through each day as pressures increase, as obligations multiply, as voices conflict with voices, urging us to do this or that, and grant that somehow inside each of our lives there shall be a central place of calm and quietness where we can turn and listen to a voice which is like a sound of gentle stillness a still, small voice that guides and directs our lives, infallibly.

Help us to do Thy will in this house and in this Legislature through this and every year, we ask in Jesus' name. Amen.

(Page 4) **April 1, 1977**

Father in Heaven, on this day which we call Fool's Day, help us to be wise. Hear the prayers of this House as we pray for the needs of Your people.

Aid us in gaining solutions to our energy crisis and economic problems.

Be of assistance to our fellow citizens who are in our institution for the mentally and emotionally disturbed.

Help our brothers and sisters, who are deaf or blind. Console those who are in our prisons and give them hope. Be strength and light to our State Patrol and National Guardsmen. Give patience to our school teachers.
(Page 5)

Bless and reward all elected officials of our State and give them the love and understanding they deserve. Amen.

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(Page 5) **April 6, 1977**

Father in Heaven, the Christian Community has embarked upon the season of Lent which is a time of penance for past sins, self denial to bring one's desires under control and contemplation in order to reestablish perspective.

Help us to observe this season and merit from our practice of penance.

Give us a healthy sense of guilt and a knowledge that You have removed the sin and the guilt.

(Page 6) Bring our good, but sometimes unruly desires, under the control of our intellect.

Let us understand more clearly that You are the Beginning and the End. Amen.

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(Page 6) **April 13, 1977**

Father in Heaven, we ask You for the ability to be sensitive to Your teaching. Adjust our ears to Your word so that our hearts may be adjusted to Your will.

Help us pray together so that when Your will is known, we may do it together; that when crises occur we may face them together.

Nourish us with Your Spirit poured out for all of us; feed us with the Bread of Life; strengthen us with the power that makes us Your children. Amen.

(Page 11) **May 4, 1977**

Father in Heaven, Your Son taught us that not by bread alone does man live. We know that the truth He

taught us is the basis for our life and our hope. Keep these teachings ever before us.

But we certainly live by bread to a degree and are in need of Your blessings to make the ingredients grow. We thank You for the fine sowing weather and ask You now for fine growing weather. Soak our fields and meadows and in turn shine the marvelous rays of the sun on our crops that there may be enough to spare and to share. Amen.

(Page 13) **June 1, 1977**

Dear Lord, An honest prayer some of us might make this morning is simply, "Thank God its over!" These many weeks have been such a drain on so many of us, taking us away from responsibilities and loved ones elsewhere, and demanding so much of us. The memory of our last working day is still fresh in our minds, and some of us hope there will never be another one like it, even though it was a record day!

On the other hand, Lord, we are also grateful for these past months and for all the good that has been accomplished. May our decisions be for the benefit of the (Page 14) people of this state. Continue during the interim to give vision, courage, and integrity to each of the Senators. Bless them, their families and loved ones, till we meet again. Be with our Governor and Lieutenant Governor, the various officers and servants of this Legislature. May the people of this state, who often hear only the unusual things which occur in this room, appreciate the ability and dedication of this Legislature. Implant again upon our minds the truth that greatness is found in serving, and success in helpfulness. May this Legis-

lature continue to love you, their God, and serve all the people. In our Lord's name. Amen.

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(Page 14) **January 5, 1978**

O Lord our God, as we seek thy guidance this day, we do not ask to see the distant scene, knowing that we can take only one step at a time. Make that first step plain to us, that we may see where our duty lies, but give us a push, that we may start in the right direction. Through Jesus Christ our Lord. Amen.

(Page 15) **January 9, 1978**

Dear Lord, we recognize that prayer cannot balance a budget, but it can balance our minds; we also realize that we cannot expect you to come into our world everyday the way you came that first Christmas Day, but you can come into our worlds through the lives of others around us who care and share our dreams and goals, so in this prayer in this day, we ask that your truth be made known in our minds and hearts and in the minds and hearts of others around us that, together, your spirit may guide us as we strive to make this world more like what you intended it to be for all people. Amen.

(Page 16) **February 3, 1978**

O God of us all, may the members of this legislative body keep ever before them the high responsibility which is theirs.

They have an unprecedented challenge; may they make appropriate responses and continually to develop into statesmen. May their debates ever be upon issues,

rather (Page 17) than upon human personalities. Give this body the vision to have courage for greatness. May they respond to their challenges, living neither in their vacuum of futility or the gold fish bowl of exhibitionism. Guide them to live as responsible, elected officials, with courage, integrity, vision, cool minds and compassionate hearts. In our Lord's name. Amen.

(Page 18) **February 14, 1978**

O God, we consider our resources in money, men and land, yet forget the spiritual resources without which we dare not and cannot prosper. Forgive us for all our indifference to the means of grace thou hast appointed. Thy Word, the best seller of all books, remains among the great unread, the great unbelieved, the great ignored. Turn our thoughts again to that book which alone reveals what man is to believe concerning God and what duty God requires of man. Thus informed, thus directed, we shall understand the spiritual laws by which alone peace can be secured, learn what is the righteousness that alone exalteth a nation. For the sake of the world's peace and our own salvation, we pray in the name of Christ, thy revelation. Amen.

(Page 24) **March 20, 1978**

Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.

The days of his life-giving death and glorious resurrection are approaching. This is the hour when he tri-

umphed over Satan's pride; the time when we celebrate the great event of our redemption.

We are reminded of the price he paid when we pray with the Psalmist:

"My God, my God, why have you forsaken me, far from my prayer, from the words of my cry?

O my God, I cry out by day, and you answer not; by night, and there is no relief for me.

Yet you are enthroned in the Holy Place, O glory of Israel!

In you our fathers trusted; they trusted, and you delivered them.

To you they cried, and they escaped; in you they trusted, and they were not put to shame.

But I am a worm, not a man; the scorn of men, despised by the people.

All who see me scoff at me; they mock me with parted lips, they wag their heads:

He relied on the Lord; let Him deliver him, let Him rescue him, if He loves him." Amen.

(Page 28) **April 21, 1978**

Dear Lord, An honest prayer some of us might make this morning is simply, "Thank God its over." These many weeks have been such a drain on so many of us, taking us away from responsibilities and loved ones elsewhere, and demanding so much of us. The memory of our last working day is still fresh in our minds, and some

of us hope there will never be another one like it, even though it was a record day.

On the other hand, Lord, we are also grateful for these past months and for all the good that has been accomplished. May our decisions be for the benefit of the people of this state. Continue during the interium to give (Page 29) vision, courage, and integrity to each of the Senators. Bless them, their families and loved ones, till we meet again. Be with our Governor and Lieutenant Governor, the various officers and servants of this Legislature.

May the people of this state, who often hear only the unusual things which occur in this room, appreciate the ability and dedication of this Legislature. Implant again upon our minds the truth that greatness is found in serving, and success in helpfulness. May this Legislature continue to love you, their God, and serve all the people. In our Lord's name. Amen.

EXHIBIT 3—1979 PRAYER BOOK

(Page 2) January 9, 1979

Dear God, we hear that "prayer changes things," but that really isn't true. Prayer doesn't move mountains, but it can move us to move mountains. Prayers won't endorse our blank checks, nor pass the right bills, nor pass the correct legislation, but it can move us to do these things. Prayer doesn't so much need discussion as it needs doing Prayer isn't a motion to be tabled, it is a mood to be expressed. So as and if we take this moment for prayer,

teach us as our spirits reach out to you, that while You may not do all things for us, You can help us do the things when left to ourselves. Prayer doesn't offer escape, it gives encouragement, enlightenment, and can enable us to be better than otherwise we could. May that be our experience today. Amen.

(Page 5) **February 5, 1979**

Dear God, as we seek Thy guidance in the crucial decisions of this day, we do not expect to understand the ramifications of the problems confronting us knowing that we can only take one step at a time, and make one decision at a time. But make that first step plain to us, and that first decision clear, that we may see where our duty lies. Now, give us a push that we may start in the right direction. By the power of Thy Spirit. Amen.

(Page 6) **February 26, 1979**

Dear God, when someone asks us our religious preference, maybe we're tempted to say, "I'm a Jehovah's Bystander"—I was asked to be a Jehovah's Witness, but I just didn't want to get involved. Sometimes it's that way with us, not only in our religious preferences, but in our political preference, and our personal preference—we just don't want to get involved. And yet, that's the name of the game as far as we're concerned in this Legislature, we've been willing to get involved, by our campaigning, by our electionings, by our speeches and by our voting. Help us to (Page 7) understand that that's what it means to be a leader of the people, to be involved, in everything that involves the people of this State. Since we've gone this far in our involvement, help us to go all the way, dear God,

that we, individually, and as committee members, and as a Legislature, may be involved with each other, with the concerns of this State, with the needs of our constituents, and with You, so that we may not only be involved, but may revolve around that which is important, and evolve the kind of legislation which You can bless. Amen.

(Page 8) **March 26, 1979**

Gracious God, we have entered this legislative chamber, not only with a public agenda, but with our own private agendas. We who face the problems of this State also face our own problems. Moments of sadness are no stranger to us. Today some of our loved ones are facing illness and perplexity. And we who have shared moments of victory also know what it is to share moments of defeat. Merciful God, speak to each of us that renewing and transforming word, which is not merely the echo of our voices, but the Word which comes from Thee. Help each of us to meet this day in Thy strength. Amen.

(Page 9) **April 4, 1979**

O God, we pray that you will bless these men and women, chosen by the people of every district of this great State, for you know each one of them, their needs, their motives, their hopes, and their fears. Put Your arm around them to give them strength, and speak to them to give them wisdom greater than their own. May they hear Your voice and seek Your guidance.

(Page 10) May they remember that you are concerned about what is said and done here, and may they have a clear conscience before You, that they need fear no one.

So bless each of us according to our deepest need, and use us for Thy greatest glory; we ask it in our Master's name. Amen.

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(Page 10) **April 9, 1979**

Today as we are about to celebrate the great Holy Days of Christians and Jews, Holy Week and Passover, let us be reminded again through the faith and beliefs of our religions of the principles and directives which should guide us. May there be a continuing concern on your part as legislators for those who are in need, for those who are deprived of any of their rights in our State, and for the promotion of justice and prosperity for all. May these Holy Days, then, enable us to act as true followers of the beliefs which we have and may it find expression in every act and law that is passed. May this Holy Season be a happy season for us and for all people of this State. Amen.

(Page 12) **May 15, 1979**

Father in Heaven, our minds and our souls are turned to the question of energy. You have blessed this world with minerals and other sources which we, sad to say, sometimes have squandered.

Help us to find a way to preserve our resources, find new sources and to use them wisely.

Bless this Assembly today and inspire our leaders to provide leadership and courage in our search for solutions.

We ask this through Christ our Lord. Amen.

ORDER GRANTING LIMITED CERTIORARI

On November 1, 1982, this court entered the following order in *Frank Marsh, State Treasurer, et al. v. Ernest Chambers,* No. 82-23.

> "The petition for a writ of certiorari is granted limited to Question 4 presented by the petition."

Question 4 presented in the petition for writ of certiorari was stated as follows:

> Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment of the United States Constitution?

82-23

Nos. 81-1077 and 81-1088

Office - Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, et al.,

Petitioners,

—v.—

ERNEST CHAMBERS,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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August, 1982

QUESTIONS PRESENTED

1. Whether the Nebraska legislature, which has retained the same chaplain for 16 years to open each session with a prayer, which has compensated this chaplain by a monthly salary for his prayers, and which has reprinted at state expense the chaplain's prayers in a Prayers Book for distribution to the public, has thereby violated the Establishment Clause of the First Amendment.
2. Whether the Tenth Amendment, principles of federalism, or absolute immunity barred a federal district court from adjudicating this First Amendment lawsuit and granting appropriate relief against defendants, who are the Executive Board of the Nebraska Unicameral, its chaplain, and the state treasurer.

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STATEMENT OF THE CASE

Petitioners' statement of the case omits several important facts contained in the record. Respondent Ernest Chambers is a State Senator in Nebraska's Unicameral Legislature. He has held this office since 1970. During the entire time that Mr. Chambers has been a member of the Unicameral, a prayer has been delivered each morning on the floor of the Legislature by Reverend Robert E. Palmer, a Presbyterian minister. Reverend Palmer has been employed as the Unicameral's Chaplain since 1965, and is paid $320 a month from the state treasury for his services. In 1975, 1978 and again in 1979, the Unicameral ordered that the Reverend's prayers be reprinted at state expense in a Prayers Book for distribution to the public.

This lawsuit was filed on December 12, 1979. It alleged that the Unicameral's

prayer practice--the institutionalization of daily prayer, the compensation of the Chaplain, and the reprinting of the Chaplain's prayers--violated the Establishment Clause of the First Amendment.

A trial on the merits was held in the district court on December 1, 1980. The following evidence, which is nowhere mentioned in the Petition for Certiorari, was adduced at trial.

1. All witnesses agreed that the continuous retention of a Christian clergyman as legislative chaplain gives, or could give, the impression that Christianity is the "official" or "normal" religion of the State of Nebraska. [Tr. at 20, 43-44, 107]. Reverend Palmer admitted "it could be perceived as such." [Tr. at 107].

2. All witnesses agreed that the Unicameral probably would never appoint

a non-Christian to be its chaplain. [Tr. at 15-16, 125-26]. Defendant Frank Lewis, a member of the Unicameral's Executive Board, stated that most legislators would object if a non-Christian were appointed chaplain. [Tr. at 126-126].

3. All witnesses agreed that Reverend Palmer's prayers could offend those people who did not share his particular religious beliefs. [Tr. at 12, 20-36, 44-46, 92, 105, 125-126]. Reverend Palmer admitted that several Jewish Senators had been offended by the chaplain's prayers and he also knew that Senator Chambers had been offended by them. [Tr. at 90, 92, 105].

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review

There is nothing in the decision below which merits further review. Its narrow holding will have little applica-

tion, if any, to other chaplaincy programs.

The Eighth Circuit's decision is predicated on the facts before it. Indeed, the only broad issue presented in this case was presented by the Respondent, Mr. Chambers, and this issue was decided against him. Mr. Chambers argued below that legislative prayer is unconstitutional per se. The Court of Appeals rejected that argument, citing Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979).

In Bogen, the court had ruled that legislative prayer is not unconstitutional per se and that each prayer program must be reviewed under its own facts. Adhering to Bogen, the court below reviewed the Unicameral's prayer program and found it to be unconstitutional. It reached this conclusion due to the presence of three factors: the Unicameral's program employed the same

chaplain for 16 years, it used state funds to pay this chaplain, and it used state funds to reprint its chaplain's prayers.

Thus, far from making novel or broad pronouncements, the Eighth Circuit expressly limited its holding to the unique facts of this case. Chambers v. Marsh, 675 F.2d 228, 235 (8th Cir. 1982).

The opinion below is so tightly drawn that the petitioners are forced to raise Establishment Clause issues entirely different from the one decided by the Court of Appeals--issues that the court had no occasion to consider. See generally Pet. at 21. Petitioners concede that the Court of Appeals "tailor[ed] its opinion specifically to the Nebraska practice", id., but seek this Court's review because in doing so, the court "left several critical questions certain to arise elsewhere unresolved." Id., emphasis added.

It is these "elsewhere" questions which the Petition seeks to raise on appeal. To illustrate its point, the Petition states that the decision below "leaves unresolved ... the question of what analysis is proper when only one element is questioned, for example, only the compensation of a legislative chaplain." Id. The short answer to petitioners' argument in this respect is quite simple: these questions were left unresolved because they were not presented, and because their resolution was unnecessary to disposition of this case. Any resolution of these questions in the context of this case would be merely an advisory opinion.

There is only one issue on appeal regarding the merits of this case. The Court of Appeals concluded that the prolonged retention of a single chaplain to offer legislative prayer, when com-

bined with the state's compensation of this person and the reprinting of his prayers, violates the Establishment Clause. The correctness of this conclusion is the only Establishment Clause issue which this case presents. Yet the resolution of this question has so little application to any other chaplaincy program that the decision below does not merit this Court's attention.

The limited nature of the decision below is revealed by the fact that, under its rationale, the Unicameral may continue to offer daily legislative prayer. What it may not do is to conduct a prayer program which combines the three elements that were initially part of its program: a chaplain retained for a prolonged period of time, compensated for his prayers, and whose prayers are reprinted at state expense for public distribution.

The issues which petitioners would like to have resolved--such as what analysis might have been proper if only the chaplain's compensation had been challenged--must await a case which raises those issues. This one does not.

B. The Decision Below Does Not Conflict With Any Federal Court Decision.

The decision below does not conflict with any federal court decision. To the contrary, it is completely consistent with a host of cases enjoining state officials from engaging in various religious activities, especially where state expenditures of funds are involved. See, e.g., Stone v. Graham, 449 U.S. 39 (1980)(posting the Ten Commandments on classroom walls); Gilfillan v. City of Philadelphia, 637 F.2d 924 (3rd Cir. 1980), cert. denied, 451 U.S. 987 (1981)

(using public funds to construct a platform for the Pope's speech); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981)(printing a prayer on state highway maps); Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D.N.C. 1980)(hiring a police department chaplain).

Although petitioners urge this Court's review on the basis of an asserted conflict with Colo v. Treasurer and Receiver General, 392 N.E. 2d 1195 (Mass. 1979), see Pet. at 18, the Supreme Court of Massachusetts was not faced by all three factors relied on by the Eighth Circuit. There was no indication in Colo that the legislature had paid for the printing and public distribution of the legislative chaplain's prayers. In any event, there is no pressing need for this Court to review this conflict in the absence of any indication that

other states are following the Massachusetts decision, which is contrary to this Court's longstanding Establishment Clause analysis and inexplicable in its focus not on the payment for religion but on legislative prayer itself.[1/]

C. The Decision Below Is Eminently Correct.

The decision below is a careful application of settled Establishment Clause law. It recognizes that the line of separation between church and state "'is a blurred, indistinct and variable

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1/ Reference to legislative prayer practices in some opinions in this Court's Establishment Clause cases (Pet. at 18) hardly suffices to create a conflict worthy of certiorari, especially since there is no reason to suppose that those dicta addressed a prayer program and public expenditures analogous to Nebraska's.

barrier depending on all the circumstances of a particular relationship.' Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)." Chambers v. Marsh, supra, 675 F.2d at 233-234 (emphasis supplied by the Court of Appeals). Upon the review mandated by Lemon, the Eighth Circuit has correctly found that the particular relationship between the Nebraska Legislature and Nebraska's prayer program has fallen into the "quagmire" of state establishment of religion warned against in Bogen v. Doty, supra, 598 F.2d at 1114.

The court below did not question the right of the Legislature to offer prayers. It merely held that the manner in which the Legislature was exercising this option crossed the constitutional barrier:

> In our view, Nebraska has fallen into that quagmire with its legislative prayer practice. For sixteen years, the Nebraska legislature has selected and paid one minister representing one denomination, to open each legislative session with prayer. The state has compensated the minister for offering such prayers. It has published his prayers for distribution to members and nonmembers of the legislature. Such a practice violates all three elements of the constitutional test applicable here.

Chambers, 675 F.2d at 234.[2/]

2/ The Court of Appeals found that the Unicameral's prayer program violated all three elements of the purpose-effect-entanglement test. Although petitioners claim that there is no evidence in the record to support the court's conclusions, Pet. at 23, 24, the record is replete with such evidence. For example, Reverend Palmer admitted during trial that he views himself as an "instrument of the Divine" whose purpose it is to help legislators realize that they, too, are "instruments of the Divine." Tr. at 100-101. The Reverend conceded that all of his prayers are consistent with his religious persuasion, all invoke God, and half are expressly directed to Jesus Christ. [Tr. at 40-41, 91]. These prayers seek to bring legislators closer to God. [Palmer Dep. at 46]. Thus, (footnote continued on following page)

D. Neither The Tenth Amendment Nor Any Principle Of Federalism Immunizes Petitioners From This First Amendment Lawsuit.

Petitioners claim that their decision to retain a chaplain for the purpose of offering daily prayer, and their decision

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(footnote continued from preceding page) there is an admitted and clearly visible religious purpose to these prayers. As the district court concluded,"[t]o say that the prayers have no religious purpose would reach incredibility; they do indeed have a religious purpose..." Chambers v. Marsh, 504 F. Supp. 585, 589 (D. Neb. 1980).

Similarly, the court's conclusion that the Unicameral's prayer program had an impermissible religious effect is also amply supported by the record. Every witness at trial, including the two defendants who testified, agreed that the Unicameral's continuous retention of a Christian chaplain could be perceived as placing the State's imprimatur on the Christian religion. [Tr. at 20, 43-44, 107]. Reverend Palmer admitted that some legislators have been offended on religious grounds by the denominational preference reflected in these prayers. [Tr. at 90, 92, 105]. Respondent Chambers testified to his aversion at great length. [Tr. at 12, 20-36, 44-46]. This statement illustrates once again that an impermissible religious effect may be harmful to religion, and why religion is too important to be left in the hands of civil magistrates.

to use public funds to finance their prayer program, is a "purely internal operation" of the Unicameral which federal courts may not scrutinize. Pet. for Cert. at 11. If this is true, then under the banner of "our federalism," petitioners can create a legislative system completely antagonistic to the First Amendment. They can decide, for example, that the Finance Committee can only be staffed by Presbyterians and that only Muslims can address the Unicameral from now on.

1. The Tenth Amendment

Petitioners invite the Court to create "a limited extension of Tenth Amendment restraint [to] civil rights lawsuits." Pet. at 13. But the Tenth Amendment can offer petitioners no immunity from this First Amendment lawsuit. Their claim that it does is refuted by the very

lanuage of the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [Emphasis added].

If the Unicameral's prayer program violates the First Amendment, as plaintiff alleged, then the Tenth Amendment cannot save it because that Amendment expressly exempts itself from applying in such situations. The Tenth Amendment does not reserve to the States the power to violate the First Amendment.[3/] The change which

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3/ As the Court of Appeals stated, "if we adopted the defendants' position, the Tenth Amendment would shield state action from the entire Bill of Rights." Chambers, 675 F.2d at 231 n.1. Accord, Marshall v. City of Sheboygan, 577 F.2d 1, 6 (7th Cir. 1978); Arrett v. Grisell, 567 F.2d 1267 (4th Cir. 1977); State of New Hampshire v. Marshall, 616 F.2d 240 (1st Cir. 1980); United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981).

petitioners seek can be accomplished only one way--by constitutional amendment--and not by judicial decree.

2. Principles of federalism

The short answer to petitioners' federalism argument is that federalism is not a one-way street. This lawsuit raises a First Amendment claim. It has always been the special province of the federal courts to adjudicate claims of this nature. Only in limited circumstances can federal courts avoid deciding First Amendment claims, and those circumstances are not present here.

The abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), is inapplicable here because there have never been any state proceedings relative to the present action. See Zablocki v. Redhail, 434 U.S. 374, 380 n.5 (1978). Cf. Patsy v. Board of Regents of the State of

Florida, ____ U.S. ____ 50 U.S.L.W. 4731 (June 21, 1982). So, too, is the limited protection offered by Rizzo v. Goode, 423 U.S. 362 (1976). This lawsuit challenges a continuous practice in which defendants directly participated under official policy. Rizzo therefore has no application in this context. Cf. Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

This lawsuit is a "classic" § 1983 action in which state officials are accused of violating the First Amendment. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights ..." Mitchum v. Foster, 407 U.S. 225, 242 (1972). The lower courts rejected petitioners' federalism arguments for good reason: respondent is entitled to a federal adjudication of his First Amendment claims.

3. Legislative immunity

Petitioners claim to possess a form of legislative immunity which this Court rejected a century ago in Kilbourn v. Thompson, 103 U.S. 168 (1881). Legislative immunity protects only those activities "related to the functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 172 (1966). Reverend Palmer's prayers are not "related" to the legislative process in that sense. As this Court explained in United States v. Brewster, 408 U.S. 501 (1972), the above phrase

> did not in any sense imply as a corollary that everything that "related" to the office of a Member was shielded by the [Speech and Debate] Clause. Quite the contrary, in Johnson we held, citing Kilbourn v. Thompson, supra, that only acts generally done in the course of the process of enacting legislation were protected.

Id., 408 U.S. at 513-514.

It does petitioners no good to argue that the chaplain's prayers have become a habitual part of morning activities. Pet. at 16-17. This is not the test. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature .... Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House." Gravel v. United States, 408 U.S. 606 (1972). The chaplain's prayers are not speech or debate. They are not related to the enactment of legislation. They form no part "of the deliberative and communicative processes by which Members participate in committee and house proceedings..." Id., 408 U.S. at 625.

It has always been proper for the judiciary "to consider whether [legislative] proceedings are in conformity with

the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme." Kilbourn, supra, 103 U.S. at 199. Petitioners' arguments are foreclosed by Kilbourn and by a host of other cases, including Gravel, Brewster, Johnson, and Powell v. McCormack, 395 U.S. 486 (1969), and would require that Bond v. Floyd, 385 U.S. 116 (1966) be overruled.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

1. Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution?

LIST OF PARTIES

In addition to petitioners Marsh and Palmer, also named as party defendants in respondent's original complaint were the members of the Legislature's Executive Board listed below. The district court dismissed these parties from the action after finding the use of a Chaplain recommended by the Board to give the morning prayers constitutional.

Frank Lewis,
John DeCamp,
Robert L. Clark,
Tom Fitzgerald,
Steve Fowler,
Howard A. Lamb,
Richard D. Marvel,
Loran Schmit, and
Jerome Warner, in their official capacities
as members of the Executive Board of the
Legislative Council of the Nebraska Unicameral.

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V. The occasional printing of prayer books by the Nebraska Legislature is of no independent significance in this case, but was of concern to the Court of Appeals only because it was perceived as stemming from the tenure of Chaplain Palmer. 41

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No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The judgment and the memorandum of decision of the United States District Court for the District of Nebraska, Honorable Warren K. Urbom, Chief Judge, are reproduced as Exhibits B and C in the Petition for Writ of Certiorari beginning on pages App. 5, and App. 7 respectively. The decision is reported at 504 F. Supp. 585 (D. C. Neb. 1980).

The opinion of a three-judge panel of the Court of Appeals of the United States Court of Appeals for the Eighth Circuit, affirming in part and reversing in part the judgment of the district court and remanding the case for further action, is reproduced as Exhibit D in the Petition for Writ of Certiorari beginning on page App. 25. The opinion is reported at 675 F. 2d 228 (8th Cir. 1982).

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GROUNDS FOR JURISDICTION

The judgment of the district court was entered on December 24, 1980, following trial to the court on December 1, 1980. Petitioners Palmer and Marsh timely appealed to the Court of Appeals for the Eighth Circuit only that the portion of the district court's judgment invalidating the expenditure of public funds to pay the Chaplain on the basis of the Establishment Clause, and respondent timely cross-appealed the portion of the district court's judgment finding the underlying prayer practice constitutional, and awarding attorney's fees. Following oral argument to the Court of Appeals on October 13, 1981, that court's opinion was entered on April 14, 1982.

Petitioners moved for a stay of the mandate pending the filing and disposition of their Petition for Writ of Certiorari which was granted by order dated May 12, 1982. The Petition for Writ of Certiorari was docketed in this court on July 6, 1982.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1), which authorizes the review of civil cases by writ of certiorari granted upon the petition of any party thereto after judgment of the Court of Appeals.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS THE CASE INVOLVES

1. *The First Amendment to the United States Constitution*

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

2. *The Fourteenth Amendment to the United States Constitution*

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *42 U.S.C. § 1983*

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

4. *Article III, Section 10 of the Nebraska Constitution*

   [T]he Legislature shall determine the rules of its proceedings and be the judges of the election, returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be

absent, incapacitated, or shall act as Governor.

. . .

5. *Nebraska Revised Statutes § 50-111 and §50-112 (Reissue 1978)*

50-111. **Legislature; officers; how selected.** The officers of the Legislature shall consist of a speaker, chief clerk, assistant clerk, sergeant at arms, and such other officers as may be deemed necessary for the proper transaction of business, to be elected by the Legislature upon the recommendation of the Executive Board of the Legislative Council, except that the board shall make no recommendation as to the speaker.

50-112. **Officers and employees; salaries; how fixed.** There shall be paid to each of the several officers, except the speaker, named in section 50-111 for their official services such salaries as shall be fixed by the Executive Board of the Legislative Council, unless otherwise directed by the Legislature.

6. *Rule 1, Sections 1, 2 and 21 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

A. Election of Officers

Section 1. Officers To Be Elected. At the commencement of each regular session in odd-numbered years the Legislature shall nominate from the floor and elect by secret ballot the following officers:

Speaker

Chairman of Committee on Committees

Chairman of Executive Board

Vice Chairman of Executive Board

6 Members of Executive Board (See footnote)

Before the ballot is taken each person so nominated may make a public statement to the Legislature indicating what the Legislature may expect from him or her in the area of the responsibility

of such office. The officers so elected shall hold such office for a period of two years.

The Legislature elects two from legislative districts Nos. 1, 2, 15, 16, 23 through 30, 32 through 35, and 46; two from legislative districts Nos. 3 through 14, 20, 31, and 45; and two from legislative districts Nos. 17 through 19, 21, 22, 36 through 44, and 47 through 49. Speaker is member of Board; Chairman of Appropriations is nonvoting member; R. R. S. 50-401.01.

Section 2. Officers To Be Approved. In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers:

Chief Clerk of the Legislature
Assistant Clerk of the Legislature
Sergeant at Arms
Chaplain

. . .

. . .

Section 21. Chaplain. The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

7. *Rule 7 (A), Section 1 (b) of the Rules of the Nebraska Unicameral*

RULE 7—PROCEDURES AND MOTIONS

(A) Order of Business

Section 1. Meeting Time, Restrictions. . . .

(b) The order of business of the Legislature shall be as follows; except as otherwise provided by the Speaker.

a. Prayer by the Chaplain
b. Roll call
c. Call for correction of the Journal
d. Petitions and memorials

. . .

. . .

STATEMENT OF THE CASE

Respondent, a duly elected member of the Nebraska Unicameral Legislature, brought this action under 42 U. S. C. § 1983 to "remove the religious content from the Nebraska Legislature and to prevent the expenditure of public funds for such purpose". (J. A. 3) He alleges that the existence of a Chaplain delivering morning prayers before the Legislature, the expenditure of public funds for the Chaplain's salary, and the expenditure of public funds for recording the daily prayers and subsequently printing them in prayer books violated his rights guaranteed by the First Amendment of the United States Constitution. (J. A. 6)

His prayer for relief requested that members of the Legislature's Executive Board be enjoined from implementing legislative rules authorizing the recommendation of a Chaplain each new legislative session, that Robert E. Palmer be enjoined from assuming the post of Chaplain and from receiving any compensation, and that Frank Marsh, State Treasurer, be enjoined from expending public funds for the payment of Palmer's salary and the printing of the prayer books. Respondent further requested that legislative rules authorizing the selection of a legislative Chaplain be declared unconstitutional, void and unenforceable. (J. A. 6-7)

The Nebraska Legislative Prayer Practice

The Nebraska Unicameral Legislature convenes its biannual sessions in the capitol city of Lincoln, a community of approximately 150 churches, over 100 of which are non-Catholic, and a Jewish Synagogue and Temple. (J. A. 52-53) The Legislature's use of a Chaplain to begin

each day's sitting with a prayer began as early as 1855, twelve years before Statehood. From 1867 to 1973, state statutes authorized a Chaplain as an officer and employee of the Legislature for that purpose, and also authorized compensation. These statutory provisions were terminated in 1973, but the internal rules of the Unicameral since then have required its Executive Board, which is responsible for the administrative functioning of the Legislature, to recommend a Chaplain for each session to the Legislature for its approval, and they further provide that the duty of the Chaplain will be to attend an opening day's sitting with prayer. (Pet. App. 11)

By express provision of the Nebraska State Constitution, the Legislature is authorized to determine the rules of its own proceedings and choose its own officers. (Supra, p. 3) The Chaplain is one of four, traditional non-legislator officers approved upon recommendation of the Executive Board pursuant to Legislative Rule 1, Section 2, rather than by nomination and election by secret ballot from the floor, as is the case with the other officers. (Supra, p. 5) Regarding the four non-legislator officers, the Board's responsibility is to place in the hands of the Speaker of the Legislature on the first day of each biannual session the name of an individual nominated as Chaplain. Each member of the Executive Board has an equal voice in the nominating process. All that is required for a nomination to go forward is that it receive a majority of five votes. (J. A. 65-66)

As a practical matter, the Executive Board has not found it necessary over the history of the Legislature to involve itself regularly in a detailed search and selection

process for nominating the four traditional officers. (J. A. 65) The selection of a Chaplain in particular has not been that big of an issue and has been handled in a perfunctory manner. (R. 116, 121) There was a deviation from the usual process in 1979, due to confusion over whether the incoming or outgoing Executive Board was to make the recommendation. The two boards apparently made different nominations so the matter was taken directly to the floor where Palmer was approved as Chaplain for the ensuing session. (R. 118-120)

The Executive Board also sets the compensation of the officers and employees of the Legislature pursuant to authority vested in it by relevant statutes charging it with responsibility of carrying out the ongoing administrative functions of the Legislature. (J. A. 63)

As required by legislative rules, the morning prayer by the Chaplain is the first order of business of the Legislature each day and occurs at 9:00 a. m. after the call to order. At that time, members of the public are rarely in the galleries. (J. A. 71) There is no official policy of the Legislature with respect to the Chaplain other than that the office is part of the Legislature's historical precedent and ceremony, as is also the case with the Clerk and Sergeant at Arms. (J. A. 63) Frank Lewis, Executive Board Chairman, testified that in his view Chaplain Palmer has been retained for several sessions because he has undertaken the Chaplain's job in a satisfactory way without the injection of any degree of religious dogma into the office which, had it occurred, would have necessitated a change. (J. A. 68)

In three past years, 1975, 1978, and 1979, upon separate motions from the floor, the Legislature approved the printing of assorted prayers in a small book for distribu-

tion to the legislative membership, and to anyone else on request. 200 copies of the 1975 and 1978 books, and 100 copies of the 1979 book were printed. (J. A. 13)

Respondent and His Challenge to the Prayer Practice

Respondent Ernest Chambers, of Omaha, Nebraska, has been a duly elected member of the State Legislature since 1970. He described in detail his strict, fundamentalist Christian upbringing which he characterized as "a religious straight jacket." (J. A. 27-29) While he avoids attempting to label his beliefs, he does not believe in anything supernatural and adheres to no particular religion to the extent that the term implies belief in some spiritual or supreme being. He knows for certain that he is a non-Christian. (J. A. 21-22)

Chambers objects to the overall legislative prayer practice principally because of the content of the prayers —that is, he does not believe in what he perceives the prayers to deal with. He considers the morning invocations to be a religious ceremony improper for the Legislature to be involved with and to pay for with public funds. (J. A. 23) Accordingly, he excuses or absents himself from the legislative chamber each morning during the time that the prayer is given, sometimes standing just outside the chambers, sometimes going back to his office. No attempt is made to prevent him from doing so. (J. A. 22)

The other members of the Legislature are aware of his sensitivities and he testified that his views were expressed to the Chaplain in January of 1979. (R. 6) It was at that time that Chambers, as a member of the Executive Board, attempted to get the Board to do away with the position of Chaplain, and failing that, to at least terminate his compensation. This attempt was unsuccessful. (R. 7)

He stated on cross-examination that he would object to the prayer practice even if no compensation was involved, or if the Chaplain were someone other than Robert Palmer. He further stated he would object even if the morning prayers were given by lay persons. (J. A. 30-31) Even if the invocation contained no religious references he would object to it being offered by a Chaplain because he feels that the designation "Chaplain" by definition is religious. (J. A. 34)

The Legislative Chaplain

Petitioner Robert Palmer is a Presbyterian clergyman who has been affiliated with Westminster Presbyterian Church in Lincoln since 1963. In 1965, after the death of the then Legislative Chaplain, Palmer allowed his name to be submitted for consideration as successor upon the suggestion of friends. (J. A. 41) Palmer's church has no official policy or position on his service as Chaplain. He endeavors in his own right to become involved in community activities for which he may personally have time, but any such decision is an individual decision on his part and means taking extra time out of his day, rather than time away from the church and his responsibilities to it. (J. A. 50-51)

He and several other clergypersons were interviewed by the Legislature's Executive Board and he was selected as Chaplain. (J. A. 41) He was informed during his interview that the duty of the Chaplain was to provide the morning prayer to open each day's sitting, but received no further directive or input from the Executive Board, then or subsequently, as to the content of the prayers. His perception was that as a result of the tradition and history of the Legislature, a part of the morning ceremony was the offering of the prayer or a time of meditation, similar

in purpose to invocations he's offered at other public ceremonies such as high school baccalaureates. (J. A. 41-42)

Palmer testified that he never has made salary a point of his being Chaplain and did not know the amount of any remuneration in 1965. (J. A. 74) The compensation has increased gradually over the years and currently amounts to approximately $320.00 a month for each month the Legislature sits. Payment is by check made out to Palmer personally which he deposits in his personal bank account. (J. A. 50)

A general process is employed in conceiving the legislative prayers. He attempts to write out each morning's prayer in advance of its offering, and bases them on conversations he had with the senators or on something he had seen or heard in the media in an attempt to incorporate something of the spirit and flavor and point of that particular day into his prayers. He stated his purpose and hope in offering the prayers is to provide a reminder for those present that they are called upon and being watched in the hope that they might do their very best in their deliberations and discussions and committee responsibilities for that day. (J. A. 43-44)

He incorporates into his prayers secular writings and religious references that he believes to be common to what he termed the Judeo-Christian heritage or civil religion of America. In this way, his references are reflective of religious expressions that are common to most Americans, and the legislative membership. (J. A. 44-45) However, he stated that he does his best to avoid an emphasis on any particular faith or sect or group in his religious references, (J. A. 49) and has made it a specific point never to inquire about the religious composition of the Legislature. (Pl. Ex. 5, p. 42, R. 1) Palmer testified that he

does not intend in his morning prayers to attempt to proselytize anyone to his particular church or faith, nor to try to convince somebody to any other particular point of view. (J. A. 61) He knows of no one who has joined his church because of his service as Legislative Chaplain, nor has he observed any other effect of his service outside the legislative chamber. (R. 79)

During his tenure as Chaplain, Palmer recalls only two occasions when he was made aware that someone's sensibilities were offended by the morning prayer practice. Both occurred in 1980. The first resulted from the concern of a Jewish senator after a prayer offered by a substitute cleric. Palmer stated that from that point on he deleted any reference to Jesus or Christ in his prayers in deference to the sensibilities that had been offended. The second occasion was his learning from the media of respondent's objection to the prayer practice. (J. A. 49)

Throughout Palmer's tenure, the occasion often has arisen for visiting clergypersons to provide the morning offering, either because of his absence or because a senator would request a clergyperson of his or her choosing. Without exception every request for or by another clergyperson to offer the prayer was honored. Clergypersons have included those from faiths other than Christianity, including the Jewish faith. (J. A. 46-47) Additionally, Palmer has made attempts to solicit other clergypersons to volunteer to deliver the offering. These attempts have met with difficulty for the reason that to so appear often was a real imposition on their busy time schedules, particularly for those who reside outside the city of Lincoln, and an economic imposition as well. (J. A. 90-91)

Judgments of the Courts Below

The district court found that the Legislature's use of a cleric to offer the morning prayers alone was not viola-

tive of the Establishment Clause, such practice having the "clearly secular purpose of bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner", having a primary effect "neither to advance nor to inhibit religion", and entangling "the state in religious affairs only nominally." (Pet. App. 13-18)

However, the district court found paying from public funds for both the printing and distributing of the prayer books and the compensation of the Chaplain violated the Establishment Clause for separate reasons. The printing of the prayer books was found to have no secular purpose. (Pet. App. 18) The compensation of the Chaplain was concluded to have the direct and immediate effect of "securing a firm and continuing relationship with a particular cleric of one denomination to the virtual exclusion of all others for at least the several-month session of the Legislature." (Pet. App. 19-20)

The Court of Appeals purported to employ a somewhat different analysis of the prayer practice than was used by the District Court. It first asserted that since the legislative prayer practice was challenged in its entirety, its several components could not be separated and independently examined for Establishment Clause validity, as was done by the district court, but rather, that the practice must be viewed as a whole. (Pet. App. 33-34) So viewed, the Court of Appeals concluded that the Nebraska prayer practice violated all three elements of the tripartite Establishment Clause test. It first found that the purpose of the practice as a whole must be to advance and give preference to one religious view over the others for the simple reason that "[t]here is little other reason for singling out one minister of one denomination for such extended period of time," and for publishing his prayers under state auspices. (Pet. App. 36)

The primary effect of the practice as a whole next was found "unmistakably to advance religion and to give preference to one religious view. The state has placed its offficial seal of approval on one religious view for sixteen years and has stood behind that seal with its funds —both to compensate the minister and to publish his prayer books." (Pet. App. 36-37)

Finally, the court found that the prayer practive as a whole entangled the state with religion because the use of state funds to compensate the "same minister for six teen years and to publish his prayer books" engendered serious political division along religious lines. (Pet. App. 37) Not a single reference to the record, nor citation to authority, was made in stating and explaining the controlling conclusions. However, the court did take care in pointing out that it did not rule unconstitutional legislative prayers by Chaplains *per se,* nor did it rule unconstitutional the possibility of paid legislative Chaplains under other circumstances.

So finding, the Court of Appeals affirmed in part and reversed in part the district court's judgment and remanded the case for further action.

SUMMARY OF ARGUMENT

1. The question presented herein for review is whether the compensation and tenure of the Nebraska Legislative Chaplain renders the Nebraska legislative prayer practice as a whole violative of the Establishment Clause. The answer turns on the constitutional soundness of legislative prayers standing alone. Both the district court and the Court of Appeals for the Eighth Circuit expressly concluded that beginning each legislative day with prayer is permissible under the Establishment

Clause. This determination was not contested by respondent by the filing of a cross-petition for writ of certiorari, nor was it added to petitioners' question presented for review to this court in its grant of limited certiorari. Consequently, this underlying question may be considered conceded in the disposition of this cause.

2. Should the court be compelled to address the constitutionality of having legislative prayers at all, the conclusion must be that they pose no Establishment Clause problem standing alone.

(A) This court has made clear that the Establishment Clause does not require absolute and total separation of government and religion. In adopting the concept of benevolent neutrality, the Court has advised that the clause proscribes only that sponsorship, financial support, and active involvement of the sovereign and religious activity intended to establish or interfere with religious beliefs and practices or having the effect of doing so. *Walz v. Tax Commission*, 397 U. S. 664 (1970). *Walz*, and *McGowan v. Maryland*, 366 U. S. 420, the only two Establishment Clause cases in this century not involving government and education, were decided largely on the basis of historical considerations which are directly applicable to this case, and alone are dispositive thereof.

The Nebraska legislative prayers traditionally have been employed to begin each legislative day since before statehood more than a century ago. The identical practice has existed elsewhere from the earliest days of this country, and in particular, within the federal houses of Congress. Legislative prayers received the *de facto* approval of those responsible for the drafting of the religion clauses, which fact is of special and great weight when interpreting them in the contemporary setting. *Myers*

v. United States, 272 U.S. 52, 175 (1926). Legislative prayers enjoyed widespread acceptance throughout the states from early in the history of country up to the present, and they have been accepted as valid without extended discussions in prior decisions of this court. Finally, history tells us that legislative prayers do not represent any realistic potential for the kind of strife the Establishment Clause was intended to prevent, because no such strife has ever surfaced as a result thereof.

These were the very considerations singled out by the court in upholding tax exemptions for church property in *Walz*, and state Sunday closing laws in *McGowan*. They support the same conclusion with respect to legislative prayers.

(B) Legislative prayers also pass muster under the more often applied purpose-effect-entanglement test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The legislative prayers have the clear secular purpose of bringing the Legislature to order each day by means of a brief, solemn and thoughtful act in a traditional manner. This was the express finding of both of the courts below. Consistent therewith, employing legislative prayers for such a purpose has no direct and immediate effect of advancing religion which would render them impermissible. Considered in the light of the fact that the audience to whom the prayers are directed is a group of mature adults who themselves have authorized the prayers for essentially ceremonial purposes, it simply can't be said that the prayers go so far as to have the effect of inculcating religious values or establishing a state church. To be impermissible the effect must be to *advance* religion rather than merely acknowledge its place in our heritage, which is the only effect of legislative prayers.

The legislative prayers involve no excessive entanglement between government and religion. No religious institutions are benefited, since the Chaplain is retained, not as the representative of any particular church, but as an individual. The only administrative involvement of the Legislature with the prayers is a simple majority vote of the Executive Board, approved by the full Legislature, recommending a Chaplain. From that point on during ensuing two-year session, the Chaplain is solely responsible for the prayers, with no input or oversight coming from the Legislature. There simply is no resulting relationship between the state and any religious authority.

3. Compensation of the legislative Chaplain does not render the prayer practice suspect merely because the government involvement or aid takes the form of cash payments from public funds. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 658 (1980). The reason for this proposition is obvious. The Establishment Clause concern stems not from the form of government aid, but rather from the use to which the aid or assistance is put. Applying that principle here, so long as the legislative prayers themselves are constitutionally permissible, the state may compensate someone to ensure that they are provided.

4. The record reveals a practical necessity for the Legislature to pay for the legislative prayers to be provided. Clergy residing in and around Lincoln have demonstrated reluctance to volunteer to give the morning prayer even on single occasions, indicating that such a request is an imposition on their time and expressing concern about traveling expenses. Chaplain Palmer revealed that preparing the prayer each day takes time and effort. The likelihood that any one particular cleric would con-

sent to volunteer to provide legislative prayers for the duration of a two-year session is virtually nonexistent. It has only been by hiring a single individual for that purpose that the Legislature has been able to ensure the provision of the prayers at a minimum of administrative inconvenience.

5. The principal objection of the Court of Appeals to the Nebraska legislative prayer practice actually is seen to be the tenure of the Chaplain serving at the time the action was filed, petitioner Palmer. The court cited the compensation only as reinforcing the impermissible effect it found attributable to Palmer's tenure, namely, the perceived preference for one view of religion to the exclusion of others.

(A) Not only does the record totally fail to support the finding of actual preference, it does reveal a very practical, as well as secular, purpose for retaining a particular Chaplain over a period of time. The Legislature has always viewed the legislative prayer practice as maintenance of a longstanding internal tradition. To that end, the Chaplain is retained as a ceremonial officer an employee of the Legislature. By virtue of its ceremonial nature, the prayers have never been viewed as that big of an issue within the legislative process and have not engendered any controversy in over 125 years. Understandably, then, the selection of a Chaplain has been undertaken over the years in a perfunctory manner requiring a minimum of administrative effort. That a single Chaplain has been retained for successive sessions is the best confirmation of the fact that neither he nor his prayers have engendered the kind of controversy that might pose problems under the Establishment Clause. To require the Legislature to regularly employ different clerics

as Chaplain would mean to force the Legislature to engage in regular detailed selection processes and oversight which would run the risk of excessively entangling government and religion.

(B) The Court of Appeals concluded that to retain a single cleric as Chaplain for too long a time would at some point be tantamount to the preference of one religion over others because of that cleric's affiliation with one religious denomination. This is nothing less than a determination that a cleric cannot serve beyond a particular point in time simply because of the fact that he is a cleric. As this court concluded in *Roemer v. Maryland Public Works Board*, 426 U. S. 736, 746 (1976), the early case of *Bradfield v. Roberts*, 175 U. S. 291 (1899), dispelled any notion that a cleric, or even a clerical order, cannot be employed by the state in the performance of secular tasks. In failing to be mindful of this well-settled principle, the Court of Appeals' decision discriminated against Chaplain Palmer on the basis of his religion.

(C) Even if it might be that some might perceive the Legislature as having a preference for a particular religious view because of the lengthy tenure of a particular Chaplain, this effect hardly amounts to the kind of *direct* and *immediate* effect beneficial to religion required to contravene the Establishment Clause. Were it otherwise so, *McGowan v. Maryland, supra*, would never have been decided as it was for Sunday closing laws undeniably fostered respect for religious observances and facilitated church attendance, as this court recognized.

ARGUMENT

I.

Opening Each Legislative Day With Prayer Alone Was Found by Both the District Court and Court of Appeals Not to Violate the Establishment Clause and This Determination Has Been Conceded in the Presentation of the Case To This Court.

Reaffirming the conclusion reached in virtually every reported decision addressing the constitutionality of opening invocations at public gatherings, both the district court and the Court of Appeals expressly found the longstanding practice of the Nebraska Legislature to begin each day with a prayer alone was not violative of the Establishment Clause. It was the compensation and retention of the Chaplain which were cited as being proscribed by the clause.

Respondent did not challenge this conclusion of the Court of Appeals by cross-petitioning to this court as he had challenged the same conclusion of the district court by cross-appealing to the Court of Appeals. Moreover, this Court did not put this determination at issue in its grant of limited certiorari. Consequently, it would appear that the Court can proceed to analyze the compensation and tenure issues without questioning the finding that the legislative prayers alone present no Establishment Clause problem. The only question before the court is whether the fact that the Nebraska Legislative Chaplain has been compensated and retained for 16 years transforms an otherwise constitutional legislative prayer practice into an unconstitutional one.

Notwithstanding the foregoing, petitioners are compelled for two reasons to demonstrate that the conclusions

of the lower courts regarding legislative prayers were correct before presenting arguments on the elements of compensation and tenure. First, they anticipate respondent's argument will once raise the issue, notwithstanding his failure to cross-petition for writ of certiorari. Second, since the essence of petitioners' own argument is that neither the compensation nor the tenure of the Chaplain have any purpose, effect, or significance independent of the offering of the prayers each legislative morning, and thus cannot render the entire prayer practice violative of the Establishment Clause, this court must be left with no doubt that the prayers alone are constitutionally permissible.

II.

The Nebraska Legislature's Traditional Practice of Beginning Each Day's Sitting With a Prayer Standing Alone Is Not Violative of the Establishment Clause.

That the Establishment Clause decisions emanating from this court have resulted in confusion and uncertainty is well-documented and need not be addressed in detail here. It suffices to begin the analysis of the Nebraska legislative prayers by recognizing the now well-settled proposition that the Establishment Clause does not reflect a strict, no-aid concept, nor does it prohibit state activities which might aid religion only indirectly or incidentally. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973). "Our prior holdings do not call for a total separation between church and state; total separation is not possible in an absolute sense; some relationship between government and religion is inevitable." *Lem-*

on v. Kurtzman, 403 U. S. 602, 614 (1971).[1] Rather, the court has embraced the concept of "benevolent neutrality" which recognizes that the tension between the Free Exercise and Establishment Clauses, the need to avoid hostility by government toward religion, and the need to avoid the destruction of harmless tradition, require that some accommodation of religion by government be permissible.[2]

We are advised by the Court in *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970), that what the Establishment Clause proscribes is "sponsorship, financial support, and active involvement of the sovereign and religious activity," and that "the ultimate value judgment the Establishment Clause requires be made must turn on whether the particular activities or conduct in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669.

To aid in the determination of whether particular liaisons between government and religion are tantamount to the kind of sponsorship, financial support, and active involvement of government and religion proscribed by the Establishment Clause, this Court has evolved assorted analytical guidelines. The most familiar of these is the purpose-effect-entanglement test usually traced to the de-

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[1] In *Roemer v. Maryland Board of Public Works*, 426 U. S. 736, 747-48 (1976), Mr. Justice Blackmun, speaking for the majority stated "*Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity"; *Hunt v. McNair*, 413 U. S. 734, 742 (1973), wherein Mr. Justice Powell, speaking for the majority stated "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."

[2] *See, Walz v. Tax Commission*, 397 U. S. 664, 669 (1970). (Majority Opinion of Burger, C.J.).

cision in *Lemon v. Kurtzman, supra,* but the Court has repeatedly recognized and admonished us that the tests of this nature "are no more than helpful signposts", *Hunt v. McNair,* 413 U. S. 734, 741 (1973), and "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger,* 421 U. S. 349, 358-59 (1975). *See also, Tilton v. Richardson,* 403 U. S. 672, 677-78 (1971).

This admonition is of particular application in this case for two reasons. First, the tripartite test was born, honed, and refined in a series of cases involving government aid to nonpublic schools. In fact, in this century all but two Establishment Clause cases have been concerned with the clash of government and religion in the schools.[3] Thus, that the test might be ill-suited for application in this case, which does not deal with the educational setting, should not be surprising. Second, the two non-school cases bear a striking resemblance to, and can be dispositive of, this case. Petitioners submit that the constitutionality of the legislative prayers is clear no matter to which analytical guidelines resort is had, but further submit that the court need look no further than to *Walz v. Tax Commission, supra,* and *McGowan v. Maryland,* 366 U. S. 420 (1961).

A. The Nebraska legislative prayers reflect an aged ceremonial tradition of both federal and state Legislatures which has not led to the consequences the Establishment Clause is intended to prevent.

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[3] *Walz v. Tax Commission,* 397 U. S. 664 (1970) (declared the constitutionality of tax exemptions for religious institutions) and *McGowan v. Maryland,* 366 U. S. 420 (1961) (approved state Sunday closing laws).

In *McGowan v. Maryland, supra,* this court found that state Sunday closing laws, having the purpose and effect of providing a uniform day of rest for all citizens, did not violate the Establishment Clause, nothwithstanding that Sunday was of particular significance to the predominant religious sect and would have the undeniable consequence of facilitating and encouraging church attendance. *McGowan* also held that the fact that such a traditional practice may have had a predominantly religious purpose originally was of no consequence if a legitimate secular purpose and effect could be determined at present. *Walz v. Tax Commission, supra,* found that tax exemptions granted to church property were not a violation of the Establishment Clause, nothwithstanding that such exemptions did indeed result in some economic benefit to churches.

Several factors present and largely dispositive in both *McGowan* and *Walz* are present in the case at hand and can similarly be dispositive here. First, the challenged practices had existed from the earliest days of this country. *McGowan,* 366 U. S. at 431-435; *Walz,* 397 U. S. at 677-78. The Nebraska legislative prayers have existed since 1855, twelve years before statehood, and even then were only a late coming counterpart to the legislative prayers of the federal House and Senate as is revealed by the amicus brief of the United States.

Second, the challenged practices received the *de facto* approval of those most familiar with the purposes of and the debates on, the religion clauses of the First Amendment — that is, the earliest members of the Virginia General Assembly and the United States Congress. *McGowan,* 366 U. S. at 437-40; *Walz,* 397 U. S. at 676-78. This point is particularly compelling inasmuch as this

court has acknowledged that the Construction given constitutional provisions by the first Congress is of special and great weight in interpreting those same provisions in the contemporary setting. *Myers v. United States,* 272 U. S. 52, 174-175 (1926). As the amicus brief of the United States Government again reveals, the founding fathers gave their approval to legislative prayers at the very time the First Amendment was being drafted.

Third, the challenged practices enjoyed widespread acceptance throughout the states. *McGowan,* 366 U.S. at 435; *Walz,* 397 U. S. at 676. That this also is true with respect to legislative prayers is established by the survey of the states contained in the amicus brief of the National Conference of State Legislatures, and specifically was acknowledged by the District Court in its memorandum of decision. (Pet. App. 10)

Fourth, the challenged practices have been accepted as valid without extended discussions in prior decisions of this Court. *McGowan,* 366 U. S. at 435-37; *Walz,* 397 U. S. at 679-80. Such also is the case with legislative prayers. Several of the justices of this Court instrumental in setting the parameters of permissible interaction between government and religion have concluded that legislative prayer practices are not suspect under the Establishment Clause. These expressions are probably best typified by Mr. Justice Douglas' conclusion in *Zorach v. Clauson,* 343 U. S. 306 (1952), wherein writing for the majority he stressed that the Establishment Clause did not require the adoption of a philosophy of hostility to religion, the result of which would be that:

> [p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holi-

> day; "so help me God" in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Id at 312-13.[4]

All of the factors moving the Court to sustain the longstanding traditional practices in *McGowan* and *Walz* are present in this case. One additional factor, tacitly acknowledged in *McGowan* and expressly recognized in *Walz*, of perhaps greatest significance is that continuation of such traditional practices over a period of some 200 years simply has not produced the kind of strife against which we are protected by the Establishment Clause. *See, Walz*, 397 U. S. at 678. This is similarly true of legislative prayer practices and due, no doubt, to the fact that they always have been and remain merely traditional ceremonies. As this Court observed long ago, "if a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31 (1922). There is no basis in this record to support a conclusion that the Nebraska legislative prayers in any realistic way are "intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz, supra*, at 669.

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[4] See also, Mr. Justice Reed's dissent in *McCollum v. Board of Education*, 333 U. S. 203, 253 (1948); Mr. Justice Black's majority opinion in *Engel v. Vitale*, 370 U. S. 421, 435, n. 21 (1962); Mr. Justice Clark's majority opinion in *School District of Abington Township v. Schempp*, 374 U. S. 203, 213 (1963); and Mr. Justice Brennan's concurrence therein at 299-300.

B. The Nebraska legislative prayers have a clear secular purpose, have no primary effect advancing religion, and do not excessively entangle government and religion.

1. Purpose

Neither of the two courts below hesitated in finding the Nebraska legislative prayers to have a clear secular purpose under the tripartite test. The District Court found that purpose to be the bringing of the Legislature to order by means of a brief, solemn and thoughtful act in a traditional manner. (Pet. App. 13) The Court of Appeals went so far as to recognize that this case falls within what it labeled the "ceremonial prayer" category which, as it had stated two years earlier in *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979) had a clearly secular purpose of establishing a solemn atmosphere and a serious tone for public gatherings. (Pet. App. 35) On this point, the decisions of the lower courts comport with the unanimous judicial view of opening invocations at public gatherings.[5]

The record amply supports this finding. Executive Board Chairman Lewis testified that the morning prayer practice had been retained over a time as part of the tradition and ceremony of the Legislature and not to advance any religious view. (J. A. 62) Chaplain Palmer's pur-

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[5]*Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195 (1979) (approving the use of a legislative chaplain to open legislative sessions with prayer); *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *O'Hair v. Cooke*, No. A-77-CA-236 (unreported decision of the District Court for the Western District of Texas, Austin Division (1980)); and *Lincoln v. Page*, 109 N. H. 30, 241 A. 2d 799 (1968) (upholding the opening of county board and city council meetings with prayer); *Grossberg v. Deuscibio*, 380 F. Supp. 285 (E. D. Va. 1974), *Wiest v. Mt. Lebanon School District*, 320 A. 2d 362 (1974), and *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 129 (W. D. Pa. 1972) (upholding prayers and invocations at public high school graduations).

pose each morning is to put the legislators in a frame of mind of a high attainment and to cause them to reflect on their responsibilities and obligations to the citizens of the state. (J. A. 41-42, 45) Respondent's evidence did not attempt directly to refute any secular purpose for the prayers. Rather, the essence of his argument has been that since the prayers incorporate religious references and are given by a cleric, the court should infer that the prayer practice principally was intended to have a religious purpose. Not only does he ask for improper inferences of fact, but he totally fails to countervail the abundant evidence of secular purpose. The "absence of any substantial legislative purpose other than a religious one" *McGowan, supra* at 468, is squarely refuted by the record clearly proves one up.

2. The Nebraska Legislative Prayers Have no Primary Effect That Advances Religion.

Whether an interaction between government and religion has a primary effect of actually advancing or inhibiting religion, rather than merely acknowledging or referring to religion, is perhaps the most subjective inquiry of the *Lemon* test. The Court has clarified that it is a "direct and immediate" effect of advancing religion which is of concern. *Committee for Public Education v. Nyquist,* 413 U. S. at 784, n. 39, as opposed to merely an "indirect", "remote", or "incidental" effect on religion. *Id.* at 771.

More importantly, the court has made clear that by its use of the term "advancing religion" it contemplates more than an effect that in any realistic sense only acknowledges religion's place in the American experience.

Throughout the cases, the consequence which the primary effect part of the test is intended to identify has

been characterized in different ways. For example, it was "religious indoctrination" which was of concern in *Tilton v. Richardson, supra,* 403 U. S. at 685-86 (1971), and "fostering an ideological outlook", was cited in *Committee for Public Education & Religious Liberty v. Regan,* 444 U. S. 646, 657 (1980). "Proseltizing activities of religious sects" troubled Mr. Justice Stewart in his concurring opinion in *School District of Abington Township v. Schempp,* 374 U. S. 203, 314 (1963). These and other expressions from this Court plainly demonstrate that it is those activities which are the equivalent of the inculcation of religious values which "advance" religion. Those merely employing religious references for purposes of moral inspiration, do not have the requisite advancement effect. This distinction was expressly recognized in the *Schempp* decision which invalidated Bible readings in public schools because the state failed to demonstrate only a genuine inspirational purpose for them. *Id.* at 224.

The distinction is hardly a novel one, for judicial decisions upholding government's use of references to religion for inspirational purposes abound.[6] It was described perhaps most illustratively by Mr. Justice Black, writing for the majority in *Engel v. Vitale,* 370 U. S. 421, 435, n. 21:

> [t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical docu-

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[6] *Aronow v. United States,* 432 F. 2d 242 (9th Cir. 1970) ("In God we Trust" motto on federal currency); *O'Hair v. Paine,* 312 F. Supp. 434 (W. D. Tex. 1969), *aff'd,* 432 F. 2d 66 (5th Cir. 1970) (broadcasting astronauts reading Bible from space); *Anderson v. Salt Lake City Corp.,* 475 F. 2d 29 (10th Cir. 1973), *cert. denied,* 414 U. S. 879 (1973) (granite monolith inscribed with Ten Commandments on courthouse grounds).

> ments such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance.

The legislative prayers are intended by the Legislature to be nothing more than a traditional, ceremonial step taken each day to open its proceedings. The activity is a matter of internal daily procedure directed only at the legislative membership, not at the public at large, and they are a group of politically seasoned, mature adults hardly susceptible to religious indoctrination by such ceremonial prayers. This fact alone distinguishes this case from the leading school prayer cases. *See, School District of Abington Township v. Schempp, supra* at 299-300.

Neither respondent nor Frank Lewis, Chairman of the Executive Board, view the prayers as having any personal religious significance; they simply offend respondent's sensibilities. How they are perceived by any other legislators is unknown because none were called to testify. Respondent is free to absent himself during the offering of the morning prayers and usually does so with no attempt being made to restrain him. On the basis of this showing, the conclusion of the District Court that "the primary effect of the prayers . . . is neither to advance nor inhibit religion," is the only one possible.

3. The Legislative Prayers Involve No Excessive Entanglement Between Government and Religion.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court identified three factors as controlling the entanglement inquiry: (1) the character and purposes of the

benefitted institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority. *Id.* at 615.

The Nebraska prayers are provided for at a minimum of inconvenience to and administrative involvement of the Legislature. It's rules provide that a single Chaplain be retained, essentially as a legislative employee, to serve throughout each two-year legislative session. The Legislature's administrative involvement with the prayer practice ends after a single majority vote of the Executive Board is approved by the Legislature. No input is provided with respect to the preparation of the prayers, that matter being left entirely to the Chaplain. Selection of the Chaplain has been undertaken in a perfunctory manner, and no evidence exists that it has ever been a subject of internal concern. (J. A. 65-66)

With respect to the nature of the institutions aided, the inescapable fact is that no religious institution whatsoever is aided directly by the prayer practice. The Chaplain renders his services as an individual, not as a member of his church, and no benefit to his church has resulted from his service over the years as Chaplain. There simply is no resulting relationship between the state and any religious authority.

The Court in *Lemon, supra* at 622, also pointed out that the potential for political divisiveness represented another kind of church-state entanglement forbidden by the Establishment Clause. It explained further that what it was concerned about was the realistic potential for "political fragmentation . . . on religious lines." *Id.* at 623. The record herein reveals not the slightest hint of the kind of political divisiveness contemplated in *Lemon.*

To suggest that in the administration of its own internal affairs the Legislature's decision to open each

of its days with a ceremonial prayer entails the risk of serious political division along religious lines throughout the State of Nebraska stretches the limits of credulity, and most certainly the record. There is no evidence that anyone beyond the legislative chamber even knows there is a Chaplain, which is not surprising since the legislative prayers respect only a matter of internal procedure and are not directed at the public. There simply is no excessive entanglement problem here.

III.

The Compensation of the Chaplain Has No Purpose and Effect Other Than to Facilitate the Legislative Prayers, and thus, Cannot Render the Entire Prayer Practice Unconstitutional.

A. Nothing about cash payments from public funds as a form of aid is suspect under the Establishment Clause.

While respondent has complained of the compensation of the Chaplain in addition to prayers themselves, he has done so only because the compensation makes possible the prayers. No allegations appear in the complaint regarding any independent basis for challenging the Chaplain's compensation, and that issue was not independently set out in the pre-trial order. Moreover, respondent testified that while a member of the Executive Board he attempted to terminate the Chaplain's compensation only after first failing to persuade it to terminate the prayer practice all together. (R. 7) He also made perfectly clear during the cross-examination that his objection to the compensation was merely an extension of his principal objection to the legislative prayers. (J. A. 30)

Viewed in this light, of the fact of compensation itself can contravene the Establishment Clause in only

two ways. Either cash payments from public funds are impermissible as a form of aid, or the use to which the funds are put is violative of the clause. Since the purpose of compensation is to facilitate provision of the legislative prayers and the prayers alone do not transgress the clause, the only remaining question is whether compensation as a form of aid is suspect for that reason alone.

In *Committee for Public Education & Religious Liberty v. Regan*, 444 U. S. 646 (1980), New York statutes providing for direct cash reimbursements to nonpublic schools for administering and grading certain state-prescribed examinations were under scrutiny. In addressing whether or not an Establishment Clause violation could arise merely because the assistance in that case came in the form of direct cash reimbursements, the Court noted:

> But as we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for performing the grading function. As the District Court observed, "[p]utting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect."

Id. at 657-658.

Even had the court not squarely addressed this issue in *Regan*, its conclusion therein that "None of our cases requires us to invalidate these reimbursements simply be-

cause they involve payments in cash", *id.* at 658, certainly could have been gleaned from other decisions tacitly recognizing the same principle. *Tilton v. Richardson*, 403 U. S. 672 (1971), *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U. S. 756 (1973) and *Roemer v. Maryland Board of Public Works*, 426 U. S. 736 (1976), all demonstrate that government assistance in the form of grants or payments of public funds arouses no suspicion under the Establishment Clause so long as the uses to which the funds are put are permitted thereby. The determination turns on the underlying use or activity made possible by the funding, not the mere act of funding itself. It naturally follows that where the only purpose of compensating the Chaplain is to facilitate the provision of the daily legislative prayers, that element alone cannot transform the entire prayer practice into one which has no secular purpose, or has a primary effect advancing religion, or excessively entangles government and religion. The record bears out this conclusion.

Having no purpose but to facilitate the prayers, the compensation is inexorably linked to the purpose of the prayers, already shown to be secular. There is not the slightest indication of any effect on religion by virtue only of the Chaplain's compensation, due of course to the fact that he is retained as an invidual and is paid as a legislative employee, by check made out to him personally and deposited in his personal bank account. Finally, the Chaplain's compensation, handled the usual administrative manner by which the Legisture monthly compensates all of its employees. This in no way resembles the kind of entanglement, if any at all, between government and religious authority of concern to the court in *Lemon*.

B. The findings that compensation of the Chaplain had the effect of promoting one religious view and engendered serious political division along religious lines is contrary to the evidence and was cited only as an outgrowth of the Chaplain's tenure.

The actual analysis of the Nebraska prayer practice by the Court of Appeals was conspicuously terse. More conspicuous was the court's complete failure to cite any facts from the record or a single authority in support of its conclusions. The compensation of the Chaplain was found to contribute to the unconstitutionality of the prayer practice taken as a whole, not because of the nature of the prayers or because compensation from public funds was seen as an impermissible form of aid, but apparently because the compensation was felt to have had the effect of promoting one particular religious view. (Pet. App. 37) Not only is there no evidence in the record to support this conclusion, but what evidence there is completely undercuts such a finding.

The practical, and secular, necessity for the Nebraska Legislature to provide its legislative prayers with a compensated Chaplain is readily apparent. Clergy residing in and around Lincoln are hardly beating down the door of the legislative chamber for an invitation to offer the legislative prayers. The Chaplain's own experience in soliciting other clergy to occasionally provide even one prayer illustrates that quite the contrary is true. (J. A. 90-91) Against this background, the Legislature has done the only thing it could to ensure that there will be a prayer every morning at minimum of administrative inconvenience and oversight. It has hired one person to take total responsibility for that function, which entails no small amount of time and effort.

The only effect of compensating the Chaplain, which is as old a custom as the prayers themselves dating back to 1867 in Nebraska, to be gleaned from the record is that it has indeed made possible the legislative prayers each morning with a minimum of administrative oversight by the Legislature. He is compensated once every month in the same manner that every other legislative employee is, and his appointment each session has never been that big of an issue for the Legislature, but rather a perfunctory routine. (R. 116, 121)

The Court of Appeals realized that having reaffirmed its prior conclusion in *Bogen v. Doty, supra,* approving prayers at public gatherings, it would be incongruous for it to hold that merely paying for the provision of such prayers was improper. To avoid this incongrity, it linked its concern for the compensation to the fact that it had flowed to a single cleric for a long period of time. "The state has placed its official seal of approval on one religious view for sixteen years and has stood behind that seal with its funds — both to compensate the minister and to publish his prayer books." (Pet. App. 37) Presumably, then, the Court of Appeals would allow compensation of a Chaplain who served less than "an extended period of time." (Pet. App. 38)

So viewed, the decision of the Court of Appeals is seen actually to turn on only one question, that being whether or not the retention of a single cleric as Chaplain for an extended period of time has the effect of preferring one view of religion over others. Compensation is relevant only as it might reinforce any undesired effect stemming from the lengthy tenure. This observation is confirmed in noting the court's additional conclusion that "using State monies to compensate the same minister for

16 years" engenders serious political division along religious lines. Again, compensation is merely an adjunct to and dependent on the impermissibility of lengthy tenure. It is the single question of tenure, then, which will be dispositive of this case.

IV.

The Retention of a Single Cleric as Legislative Chaplain for an Extended Period of Time Poses No Establishment Clause Problem.

Analysis of the court's reasoning finding fault with the prayer practice because of the Chaplain's lengthy tenure reveals it to be the product of a bemusing failure to take account of facts contained in the record, as well as the failure to properly apply relevant legal principles. The court first found the legislative practice had a purpose of advancing and giving preference to one religious view over others because it could find no other reason for retaining a single Chaplain for so long. It then proceeded to find a primary effect of preference of one religious view over all others, again because a single cleric had been retained as Chaplain for 16 years. Finally, the court found that compensating a single cleric for Chaplain for that length of time engendered serious political division along religious lines. The finding on each of the *Lemon* prongs derives directly from Palmer's tenure. (Pet. App. 36-37)

The first flaw in the court's opinion on the tenure question is that it simply does not square with the facts in the record. The court reminded itself that legislative prayers by clerics as a method of calling the legislative bodies to order are constitutional, citing one of its own prior decisions. (Pet. App. 35-36) Thereby, it found at least that there was nothing suspect about the nature of

prayers such as Palmer has given for 16 years, or about the fact they are daily offered by a cleric. What troubled the court was that one particular cleric should be retained to perform that function for such a lengthy period of time. This concern was not based on evidence in the record, but simply because in that court's view "there is little other reason for singling out one minister of one denomination for such an extended period of time."

There clearly is a secular purpose for retaining a single cleric over time reflected in the record, and to ignore it as the Court of Appeals did is a grievous departure from the proper Establishment Clause analysis. Since its inception, the legislative prayer practice has represented merely the continuation of a ceremonial tradition. It simply has not been that big of an issue in the ongoing legislative process in the State of Nebraska. It naturally has been in the interest of the Legislature to thus provide for the service in a manner requiring as little administrative oversight and inconvenience as possible. The Legislature has chosen that course and indeed, the retention of a Chaplain and the other ceremonial officers has come to be a perfunctory chore. So long as a particular Chaplain carries out his responsibility satisfactorily, there has been no need to make a change. As Executive Board Chairman Lewis pointed out, were the Legislature to arbitrarily select a new Chaplain at frequent intervals, the Legislature would become embroiled in a detailed selection process similar to what it goes through for hiring its non-ceremonial employees. (J. A. 65) The Legislature obviously has not found that a frequent turnover of Chaplains is necessary to ensure that the prayer practice continue as a ceremonial tradition. Palmer himself, was retained for several sessions only because he did a good job and was felt not to have

rejected any particular religious doctrine in his prayers which would have required his replacement. (J. A. 68)

The Court of Appeal's conclusion that there was no reason for retaining Palmer for 15 years cannot be reconciled with these facts contained in the record. Furthermore, the alternative suggested by the court, administering a frequent turnover of Chaplains, would force the Legislature toward a more questionable degree of entanglement with religion that it so far has been able to avoid. There is no reason to require such a substantial administive commitment to so insignificant a matter of internal legislative procedure.

There are additional flaws in the reasoning of the Court of Appeals. The finding of a preference of one religious view clearly was linked to Palmer's denomination affiliation. The court stated as much in concluding that "those who have observed or participated in Nebraska's legislative process over the last 16 years would have to conclude that the Legislature has an official view on religion which is expressed by its *minister* and promoted with the use of State funds." (Pet. App. 37) So viewed, Palmer was denied a lengthy tenure as Chaplain not because there was anything suspect about the task he performed, but because of his denominational affiliation, which after all is what makes him a cleric.

Such a result is foreclosed by the well-settled principle that the Establishment Clause may not preclude the state from employing clerics, or even clerical orders, in the performance of secular tasks. *Bradfield v. Roberts*, 175 U. S. 291 (1899); *Roemer v. Maryland Public Works Board*, 426 U. S. 736, 746 (1976); *McDaniel v. Paty*, 435 U. S. 618 (1978). As was explained in *Roemer, supra*, at 746, n. 13, to deny an individual the opportunity to en-

gage in secular activities merely because he is a cleric would amount to nothing less than discrimination against him on the basis of his religion.

The court's judgment on the question of tenure is misguided for an additional reason. That the continued retention of the same Chaplain might be looked upon by some as a preference for a particular religious view seemed significant to the court. "Those who have observed or participated in Nebraska's legislative process over the last sixteen years would have to conclude that the legislature has an official view on religion which is expressed by its minister and promoted with the use of State funds." (Pet. App. 37) However, at the most, such a perception would amount to only an indirect or incidental effect beneficial to religion, and such an effect has never been thought a sufficient defect to warrant invalidation of a state law under the Establishment Clause. *Committee for Public Education v. Nyquist, supra,* 413 U. S. at 775. Were this the case, this court could never have decided *McGowan v. Maryland, supra,* as it did, for it was undeniable that the Sunday closing laws therein upheld fostered respect for religious observances and facilitated church attendance. It is the fact of an official preferred view on religion which might run afoul of the Establishment Clause, not the mere appearance of such a preference.

The fact of the matter is that legislative Chaplains of lengthy tenure are just as much a part of the history of legislative prayer practices as the morning prayers themselves are and can be validated on that basis alone. The Court of Appeals would have done well to have remembered the words of Mr. Justice Goldberg, concurring in *School District of Abington Township v. Schempp, supra,* 374 U. S. at 308:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can flow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

V.

The Occasional Printing of Prayer Books by the Nebraska Legislature Is of No Independent Significance in This Case, but Was of Concern to the Court of Appeals Only Because It Was Perceived As Stemming From the Tenure of Chaplain Palmer.

In addition to the compensation and tenure of the Chaplain, the Court of Appeals also singled out the printing of prayer books on three separate occasions in the late 1970's, as contributing to its determination that the entire legislative prayer practice in Nebraska was unconstitutional. It is significant to note that the court did not view the mere publishing of the prayer books standing alone to be improper. Rather, its problem was with the fact that the prayers included in the prayer books were those of one particular minister. (Pet. App. 36-37) Once again, the court's principal objection is the Chaplain's tenure, and the prayer books are a mere extension of that objection. After all, Palmer's prayers had been given for 10 full years before the first book was produced.

Inasmuch as there is nothing constitutionally impermissible about retaining a single cleric over a period of time to serve as Chaplain so long as he performs a secular task, the concern of the Court of Appeals over the printing of the prayer books can be laid to rest.

Viewed independent of the Chaplain's tenure, there should be no question but that the mere act of occasionally printing legislative prayer books for distribution to the legislative membership in limited quantities, and to anyone else requesting them as long as the supply lasts, does not offend the Establishment Clause. No more than 200 copies of any prayer book were ever printed, which is the best evidence that the Legislature hardly intended thereby to go public with an "official" view on religion.

Petitioners further submit that the prayers themselves, and thus the prayer books, hardly manifest one particular religious view. They, or others similar to them, could have been offered by virtually any cleric. (J. A. 76) The printing of each book resulted from a separate motion from the floor. (J. A. 13) It in no way has ever been a part of the legislative prayer practice established by legislative rule to print up the prayers. The prayer books were approved quite obviously with the thought in mind that having been inspirational when first given, their collection in the prayer books might prolong their inspiration. Since the prayers were permissible for that purpose when offered by the Chaplain, there can be little basis for finding problem with their printing in this kind of prayer book under these circumstances.

The record is simply devoid of the slightest hint that the occasional printing of the prayer books in such limited quantity in any realistic sense has alone produced a direct and immediate effect of advancing religion. This is hardly surprising in light of the fact that up to the filing of this action, the prayers had always appeared in the legislative journal with no consequence whatever, and it is a safe bet that the daily legislative journal enjoyed far greater circulation among the public than did the handful of prayer books.

CONCLUSION

The question presented to this court for review has been changed significantly from that which the parties believed they were litigating at the time of trial. As the record reflects, respondent's case pursued a single, narrow theme, namely that since the prayers in the legislative chamber each morning were religious in nature, they represented the kind of religious activity proscribed by the Establishment Clause. Since the prayers were improper, the payment of a Chaplain to provide the prayers was improper. This was the central question to which the parties addressed themselves in their evidence and in their argument at trial.

The decisions of the District Court and the Court of Appeals for the Eighth Circuit cast the central question in an entirely different light. Following the lead of countless other judicial expressions on the constitutionality of prayers given to open public gatherings, both courts found that prayers to begin each legislative day's sitting were constitutionally sound without questioning their nature or content. Rather, the courts proceeded to find a problem of constitutional dimension because of the compensation and the tenure of the Nebraska Chaplain, facets of the legislative prayer practice presumed by the parties to be of no independent significance. The question became whether the fact that the Nebraska Chaplain is compensated and has been retained for an extended period of time transform an otherwise constitutional prayer practice into an unconstitutional one.

Proper analysis of this question by application of the Establishment Clause principles provided by this Court requires that the answer be no. The compensation and tenure of the Chaplain in this case, on the basis of this record, are seen to have no significance independent of

the legislative prayers themselves just as the parties originally had perceived. Both attributes of the prayer practice taken as a whole are as time-honored in history as the prayers themselves, and have no other purpose or effect but to ensure the provision of the prayers on a continuing basis with a minimum of inconvenience and administrative oversight.

That other legislatures have managed to provide for legislative prayers by rotating and/or unpaid clerics is of no consequence here. The pivotal inquiry is not whether the Nebraska Legislature might have provided for its legislative prayers differently, but whether the manner by which it has chosen to provide the prayers is constitutionally sound standing by itself. The record demonstrates no other purpose or effect of the compensation and retention of the Chaplain other than to ensure the day to day provision of the legislative prayers in a constitutionally permissible manner. The Nebraska practice by any realistic measure represents none of the dangers the Establishment Clause was designed to prevent, nor any direct or substantial involvement of the state and religious authority having any practical impact beyond bringing the legislative chamber to order each morning that it sits.

For the foregoing reasons, petitioners respectfully request this court to reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,
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No. 82-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, et al.,

Petitioners,

—v.—

ERNEST CHAMBERS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

May the Nebraska Unicameral retain the same Presbyterian minister as its chaplain for sixteen years to open each legislative session with a denominational prayer, make him an officer of the Unicameral, compensate him for his prayers by a monthly salary, and reprint at state expense his official prayers in a Prayer Book for public distribution, without thereby violating the Establishment Clause of the First Amendment?

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STATEMENT OF THE CASE

By legislative rule 7(a)(1)(b), the Nebraska Unicameral Legislature has provided that each legislative day must begin with a prayer offered by the Legislature's official chaplain. Every morning the Unicameral is summoned to order and, once in order, the chaplain delivers his invocation. Pet. Br. 8. As the chaplain ascends the Speaker's podium, the legislative hall falls silent, the Senators rise to their feet, bow their heads, and receive the day's prayer. (JA 23).

The sole function of the chaplain hired by the Legislature is to offer prayer. (JA 41). The chaplain is paid from tax revenues $319.75 a month for his prayers. (Pet. App. 8). In 1975, 1978 and 1979, the chaplain's

prayers were reprinted for public distribution, also at State expense.

Since 1965, the Unicameral's chaplain has been Reverend Robert E. Palmer, a Presbyterian Minister. (JA 11). In 1979, a Lutheran clergyman was also nominated as chaplain. After debate among Senators (Tr. 8-9), Reverend Palmer was re-elected.

Every chaplain of the Unicameral has been a Christian. (JA 69). Petitioner Frank Lewis, Chairman of the Unicameral's Executive Board, conceded that most legislators would object if a non-Christian were appointed chaplain (JA 69-71), and accordingly, in all likelihood, the Unicameral will never select a non-Christian for this post. (JA 26, 69-71). Mr. Lewis testified that the Unicameral would not

allow a Buddhist monk or a Sioux medicine man to give the daily prayer over a 15-year period, the length of Reverend Palmer's tenure. (Id.).

All witnesses at trial agreed that the prolonged retention of one chaplain fosters the impression that his religion is the "official" or "normal" religion of the State. (JA 29-30, 36, 62). As Reverend Palmer testified (JA 62):

> Q. Would you agree that by having a uniquely Christian Chaplain in the Legislature it adds a certain air of officialdom to the Christian faith?
>
> A. It could be perceived as such.

All of Reverend Palmer's prayers invoke Diety; all of them are theistic. (JA 58-59, 82). Half of them are uniquely Christian, supplicating Jesus Christ. (JA 23, 95-108). The chaplain's prayers

have offended several Jewish Senators as well as Senator Chambers. (JA 69). Senators have told Reverend Palmer that the chaplain's prayers have "offended them." (JA 61).

According to Reverend Palmer, his official task, offering prayer, requires him to invoke the Diety. Prayer is inconceivable without making reference to God, he explained. (JA 81). Despite the fact that all of his prayers invoke the Diety and half of them are overtly Christian, Reverend Palmer believes that his prayers reflect a non-sectarian "civil" religion (JA 83):

> A. The majority of the prayers reflect more of what I don't like to use as a phrase, but I will, to clarify things, just civil religion in America. The kind of religious expressions that are common to the vast, overwhelming majority of most all Americans.

Q. What do you mean by civil religion?

A. By civil religion I mean a religion that reflects the thinking of most Americans. And is not sectarian in any sense at all.

Until 1973, Nebraska's chaplaincy was ordained by statute. In that year the statute was repealed and the Legislature replaced it with two Rules (Pet. App. 8):

Rule 1, Section 2.

> In addition the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council the following officers ... Chaplain.

Rule 1, Section 21.

> The chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

Respondent Ernest Chambers is a member of the Legislature and a citizen and taxpayer of Nebraska. He is the son of a Fundamentalist minister. By the time he completed high school he had read the

Bible eight times from cover to cover, having been taught to believe in it "word for word as it's spoken." (JA 27-28). Eventually, his religious views changed, and he no longer considers himself to be a Christian. (JA 25, 27-29).

Senator Chambers objects to the Chaplain's prayers and is made uncomfortable by them. He finds the entire chaplaincy program offensive on constitutional and religious grounds. As he explained (JA 23-24, 33-34):

> I see a situation where tax money paid in by my constituents is going to pay the salary of a man who represents a specific religion. In the same way that everybody should be free to practice whatever religion they want to, I should be free in my official capacity from religion .... Again, I know this, that the constitution guarantees me certain rights as a citizen. That one of these rights is that I can be free from the state imposing a religious ceremony on me. I know that I have a right to represent my constituents who voted for me. And

> when I'm prevented from having access to the chamber at all times because of a religious ceremony it inhibits me in a lot of respects. And we can say it's because of my personal views with reference to religion or whatever it is. The totality of my being is offended by what happens in the Legislature when those prayers are said there.

To avoid participating in prayer, Senator Chambers must absent himself from the chamber when the doors close shortly before the prayer begins, as legislators congregate. Because the period immediately preceding the prayer is a time when much informal legislative work is done in the chamber, Senator Chambers' aversion to official prayer has alienated him from his colleagues and has inhibited his legislative abilities. (JA 22, 24-25).

Senator Chambers filed this action for injunctive relief pursuant to 42 U.S.C. §1983. The district court rejected a

variety of jurisdictional and federalism challenges made by defendants and proceeded to the merits. It enjoined the State from using tax funds to pay the chaplain's salary and to reprint the chaplain's prayers, finding that these uses of public funds violated the Establishment Clause, although it ruled that the Constitution did not prohibit the Legislature from opening its session with prayer.

On cross appeals, the Eighth Circuit rejected defendants' jurisdictional and federalism challenges. On the merits, it found it unnecessary to decide whether the legislature could open its sessions with prayer. Viewing the Unicameral's practices as a whole -- the prolonged retention of a single chaplain, the use of tax funds to pay his salary, and the reprinting of his prayers -- the Court held that the combination of these factors

particularly the first, had the impermissible effect of advancing a particular religion (Pet. App. 36):

> [T]he purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time ....

This Court granted certiorari limited to the question of whether Nebraska's compensation and retention of a legislative chaplain of one faith over an extended period of time is a forbidden law "respecting an establishment of religion."

SUMMARY OF ARGUMENT

Despite the urgings of petitioners and the Solicitor General, this case involves the constitutionality of Nebraska's retention of a single official chaplain for sixteen years, paid by public funds to open its legislative sessions by recitation of a denominational prayer, not the constitutionality of legislative prayer standing alone.

Nebraska's chaplaincy violates the secular purpose test. Although petitioners assert that Reverend Palmer's prayers further the secular purpose of bringing the Legislature to order, this Court has held that states may not rely on overtly religious means to advance incidental or ultimate secular purposes, especially where such purposes could be advanced with secular means. School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S.

39 (1980); Larkin v. Grendel's Den, 51 U.S.L.W. 4025 (1982). The Establishment Clause bars such reliance because it ordinarily denigrates and trivializes religion, as the state's conceded use of prayer as a behavioral control device -- as a gavel -- demonstrates here.

Nebraska's official sponsorship and subsidization of prayer also has an impermissible primary effect of advancing religion. Apart from violating the irreducible core of the Establishment Clause -- that no tax in any amount may be used to fund overtly religious activity -- Nebraska's practice has a forbidden symbolic effect of advancing religion generally, Larkin v. Grendel's Den, supra, and preferring a single denomination or group of denominations in particular, Larson v. Valente, 102 S.Ct. 1673 (1982).

Nebraska's chaplaincy also impermissibly entangles church and state, having

led to inter-religious disputes in the Unicameral and alteration of Reverend Palmer's prayers based on objections from various legislators.

The suggestion that Nebraska's chaplaincy is valid for reasons of history and tradition, despite its invalidity under the tripartite test, must be rejected. Unlike the practice reviewed in Walz v. Tax Commission, 397 U.S. 664 (1970), Nebraska's chaplaincy is not supported by current practice. Seventy-one of the 99 state legislative bodies have rejected Nebraska's model and rely on a voluntary, non-official, non-discriminatory chaplaincy. Twenty-nine state legislative bodies successfully maintain invocations by religious figures without any compensation. Nor does the judgment of history strongly support petitioners: John Jay and John Rutledge opposed prayer in the First Continental Congress,

the Constitutional Convention refused to accede to a call for daily prayer, and the chaplaincy created by the first Congress had features carefully designed to reduce the appearance of a symbolic establishment which Nebraska's practice lacks. In his final, considered judgment, Madison strongly opposed even that chaplaincy as inconsistent with the Establishment Clause. Objection to the congressional chaplaincy has been persistent and longstanding, and only a single court has ever upheld a paid official chaplain functioning as an integral arm of a legislature.

INTRODUCTORY STATEMENT

This appeal raises a narrow and precisely focused issue: May the Nebraska legislature require that each legislative session be commenced by the recitation of a denominational prayer by a single officially designated chaplain who receives a state salary and who has served as the official chaplain for sixteen years? The panel of the Eighth Circuit below, recognizing the precisely framed nature of the issue, declined to speculate on the constitutionality of legislative prayer in other factual settings, ruling only that the combination of factors presented in the Nebraska practice constituted an impermissible establishment of religion.[1]

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1. In our view, the practice challenged here also inescapably involves the state's publication of the chaplain's prayers at
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Similarly, this Court, in its limited grant of certiorari to the Eighth Circuit, recognized the narrow scope of this case or controversy by agreeing to review only:

> Whether the Nebraska legislature's compensation and retention of a single individual as chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment of the United States Constitution.

Nebraska, and the Solicitor General as amicus curiae, now seek to argue a wholly

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public expense. Petitioners continue to defend that publication before this Court (see, e.g., Pet. Br. 41-42), despite their professed intention not to have appealed the district court's judgment striking down that portion of the Nebraska legislative chaplaincy practice. The printing of Reverend Palmer's prayers at State expense is an integral part of the practice on which the Eighth Circuit entered a judgment this Court is now called on to review. See Pet. App. 33-34.

different case, a case which they boldly -- and improperly -- claim respondent has conceded.[2] Instead of discussing the legality of the Nebraska practice actually before the Court, petitioners seek to deflect attention to the abstract issue of whether any legislative prayer at all is permissible under any circumstances. In effect, petitioners seek to defend not the Nebraska practice, but the practice adopted by two-thirds of the states which permit volunteer, non-official clergy access to the legislative chamber to deliver prayers prior to the opening of

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2. Contrary to petitioners' suggestion (Pet. Br. at 20-21), respondent does not concede the validity of legislative prayer without more. Rather, as is set forth more fully below, he believes that that issue is not before this Court.

a legislative session on a non-discriminatory basis.[3]

The systematic use of volunteer, unpaid clergy to open a legislative session raises troubling constitutional issues and, if valid, certainly goes to the

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3. Nebraska's practice of utilizing a single paid "official" Chaplain is shared by legislatures in only 16 other states and the United States Congress. Thirty-three states reject the concept of a state-compensated "official" legislative chaplain, relying instead on volunteer clergy. See Brief of the National Conference of State Legislatures Amici Curiae 3; see also infra at 58-59. For cases discussing issues raised by the use of voluntary, rotating clergy to open public meetings, see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968). The only authority upholding a state-funded official chaplaincy is Colo. v. Treasurer & Receiver General 392 NE 2d 1195 (1979). The authority of Colo is dimmed by the fact that this Court recently repudiated the narrow vision of the Establishment Clause adopted by the Massachusetts Supreme Judicial Court. Compare Larkin v. Grendel's Den, ___ U.S. ___, 51 U.S.L.W. 4025 (1982) with Arno v. Alcoholic Beverages Control Comm'n., 377 Mass. 83, 384 N.E.2d 1223 (1979).

very verge of the Establishment Clause.[4] Volunteer, unpaid prayer, however, is far less constitutionally objectionable than Nebraska's expenditure of substantial public funds to pay a single official state chaplain who serves for an extended period of time and whose denominational prayers are treated as an integral part of the Legislative session. In Widmar v. Vincent, 454 U.S. 263 (1981), the Court upheld the practice of permitting voluntary religious gatherings prior to class at no cost

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4. Although the constitutionality of legislative prayer per se is not at issue here, we note that this Court has consistently enforced a hermetic separation of church and state so far as prayer is concerned. See Treen v. Karen B., ___U.S.___, 102 S.Ct. 1267 (1982); Tilton v. Richardson 403 U.S. 672, 683 (1971). Engel v. Vitale, 370 U.S. 421 (1962) This Court has consistently held that prayer is inherently a religious practice and, for that reason, "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves ... " Engel, supra, 370 U.S. at 435; see also id. at 429.

to the state in otherwise unused state university facilities. If, however, the practice in Widmar had involved a substantial expenditure of state funds to pay an official state university chaplain to preside over prayer services which officially began the university day, the result would almost certainly have been different. Stone v. Graham, 449 U.S. 39 (1981); Treen v. Karen B., __ U.S.___, 102 S.Ct. 1267 (1982); Tilton v. Richardson, 403 U.S. at 683; Engel v. Vitale, 370 U.S. 421 (1962).

The appellate jurisdiction of this Court does not extend to the hypothetical case petitioners now seek to argue. As we now show, whatever the validity of volunteer, unpaid and non-discriminatory legislative prayer in other settings, the Nebraska legislative practice, involving sustained favoritism to an official

chaplain of a single denomination at substantial state expense, does not pass constitutional muster.[5]

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5. The Solicitor General argues vigorously that the legislative chaplaincy of the United States Congress should be addressed in this case. We do not know whether the practice of the Senate and the House of Representatives is indistinguishable from Nebraska's; no factual record exists from which to make such a determination, since the Solicitor General has heretofore insisted that a challenge to the Congressional Chaplaincy program is barred under standing and political question doctrines, rendering the creation of such a record impossible. See genrally Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928); Murray v. Buchanan, appeal pending No. 81-1301 (D.C. Cir. 1982). In any event, the Solicitor General's attempted defense of the Congressional chaplaincy practice by arguing that all legislative prayer is not absolutely prohibited by the Constitution is irrelevant, since that question does not resolve the case or controversy actually before this Court.

I. THE EXPENDITURE OF STATE FUNDS TO SUBSIDIZE A SINGLE OFFICIAL LEGISLATIVE CHAPLAIN WHO FORMALLY OPENS EACH LEGISLATIVE SESSION WITH A DENOMINATIONAL PRAYER CONSTITUTES AN ESTABLISHMENT OF RELIGION BECAUSE IT DOES NOT ADVANCE A PREDOMINANTLY SECULAR PURPOSE; HAS A PRINCIPAL OR PRIMARY EFFECT OF AIDING RELIGIOUS ACTIVITY; AND FOSTERS AN IMPERMISSIBLE ENTANGLEMENT BETWEEN CHURCH AND STATE.

In Larkin v. Grendel's Den, supra, this Court noted that Jefferson's metaphorical wall between church and state was "substantially breached" by creating the "mere appearance of a joint exercise of legislative authority by Church and State". 51 U.S.L.W. at 4027-28. Nebraska's expenditure of substantial state funds to employ a single, officially designated chaplain to open each legislative session with a denominational prayer violates the Establishment Clause because, like

the practice invalidated in Larkin, it "provides a significant symbolic benefit to religion," and indeed, to one religious denomination.

As this Court's opinion in Grendel's Den makes clear, the starting point for an analysis of Nebraska's program continues to be the three-part test enunciated by the Chief Justice in his opinion for the Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omited):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests have been gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute may not foster an excessive entanglement with religion.

Nebraska's version of the legislative chaplaincy violates each aspect of the Court's three-part test.

A. Nebraska's Employment of An Official Paid Chaplain For An Extended Period of Time To Deliver Denominational Prayers As An Integral Part of Each Legislative Session Does Not Advance A Predominantly Secular Purpose.

Petitioners argue that Nebraska's employment of Chaplain Palmer to open each legislative session for the past sixteen years with a denominational prayer satisfies the secular purpose prong of the Lemon test because it advances the secular purpose of calling the legislature to order "by means of a brief, solemn and thoughtful act in a traditional manner". (Pet. Br. 27)[6]

6. Chaplain Palmer's prayers are denominational in the broad sense that they accord with the religious beliefs of some religious people and not of others. Thus, at (Continued on following page)

In effect, Nebraska argues that its chaplaincy practice is valid because prayer serves as an alternative to gavelling the legislature to order. Such an argument both trivializes the secular purpose requirement and denigrates the role of prayer in our spiritual heritage.

1. Direct State Aid to an Overtly Religious Activity Cannot Be Justified as Advancing a Predominantly Secular Purpose.

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the time of judgment below, more than half his prayers were uniquely Christian (JA 55), and the others were all unquestionably theistic and Judeo-Christian, contrary to the beliefs of many of the major religions. Since the First Amendment forbids placing the state "on the side of one particular sort of believers," Torcaso v. Watkins, 367 U.S. 488, 495 (1961), Reverend Palmer's alleged recent decision to eliminate references to Jesus in his prayers (Pet. Br. 12), but not other references clearly Judeo-Christian in nature, is constitutionally irrelevant, even if true.

Every one of the Reverend Palmer's prayers is a religious activity. They all supplicate the Almighty. (JA 58-59, 82). Here, as in Engel 370 U.S. at 424-25,

> [T]here can, of course, be no doubt that the [chaplain's] prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious ....

See also Abington School District v. Schempp, 374 U.S. 203, 224 (1963). The religious nature of the Chaplain's offerings is apparent on their face.[7]

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7. By contrast, such rote phrases as "God Save this Honorable Court" to open Court sessions, or "In God We Trust" imprinted on coinage, would not necessarily violate the secular purpose test. These standard phrases are so routinized as to have lost all theological significance, and moreover, are not uttered by clergymen, thereby averting the danger that prayers will be altered at a clergyman's discretion to create theological significance or a denominational preference.

The "secular purpose" test was initially developed by this Court to measure the validity of state action which had the incidental effect of benefiting religious institutions but which did not, necessarily, involve direct assistance to overt religious activity. In determining in these instances whether the challenged activity violated the purpose test, the decision has invariably turned on whether the activity in question was manifestly religious. Thus, for example, in McGowan v. Maryland, 366 U.S. 420 (1961), this Court ruled that Sunday closing laws advanced the secular purpose of assuring a uniform day of rest without providing direct assistance to an overtly religious activity and, thus, did not violate the Establishment Clause.

Similarly, in each of the cases considering varying forms of aid to parochial

education, this Court has ruled that the programs at issue were primarily designed to advance the secular purpose of assisting all children in the state to receive the highest quality education. E.g., Lemon v. Kurtzman, supra (salary supplements); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition rebates); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (maintenance grants, tuition tax credits). Since the secular government activity at issue in cases like McGowan and Lemon was seen as providing only an indirect benefit to religion, the secular purpose test acted as a helpful tool for sorting out permissible from impermissible activity.

When, however, the state has acted to provide direct assistance to an overtly religious activity -- such as worship--

the intent to assist religion has not been doubted. In School District of Abington Township v. Schempp, for example, "this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as 'the promotion of moral values, ... the perpetuation of our institutions, and the teaching of literature'." Stone v. Graham, supra, 449 U.S. at 41. Similarly, in Epperson v. Arkansas, 393 U.S. 89 (1968), the Court invalidated a statute which forbade the teaching of evolution in Arkansas public schools because the statute was obviously a reaction to theological concerns and constituted direct aid to a single "religious sect or dogma". 393 U.S. at 106. See also Engel v. Vitale, supra; Treen v.

Karen B., supra; Stone v. Graham, supra; McCollum v. Board of Education 333 U.S. 203 (1948). The crucial factor present in Engel, Schempp, Epperson and Stone is also present here: the state's activity is inherently and unmistakably religious "and no legislative recitation of a supposed secular purpose can blind us to this fact." Stone, supra 449 U.S. at 41.

Nebraska contends that its prayer program passes the purpose test because it has a secular purpose: controlling the behavior of legislators. But this Court has never suggested that a professed ultimate secular purpose could be used to shield direct financial aid to overtly religious activity from constitutional invalidity. Accepting Nebraska's argument would trivialize the secular purpose test by justifying direct state aid to

overtly religious activity whenever that activity can be said to have even an incidental or ultimate secular effect. For example, Nebraska's version of the secular purpose test would justify direct state grants to churches to subsidize worship services because church attendance might reduce juvenile delinquency or drug abuse. Even though a legislator might reasonably believe that religion can prevent those social problems, however, a state may not intentionally rely on religious means -- may not directly aid overtly religious activity -- to advance a secular purpose. See Abington School District v. Schempp, 374 U.S. at 224.[8]

8. As the Court explained in Schempp, 374 U.S. at 224, "even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion
(continued on following page)

Nebraska's attempted defense of its chaplaincy practice as a secular means of calling the legislature to order is precisely such an attempt to justify direct aid to an overtly religious activity -- worship. But although a state may validly pursue a secular purpose with secular means even if religion is thereby incidentally aided, it may not pursue a secular purpose such as bringing the legislature to order with religious means. This is

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cannot be gainsaid ...." Cf. Hall v. Bradshaw, 630 F.2d 1018, 1020-21 (4th Cir. 1980), cert. denied, 101 S.Ct. 1480 (1981) ("in this case the state has chosen a clearly religious means to promote its secular end. If a state could avoid the application of the First Amendment in this manner, 'any religious activity of whatever nature could be justified by public officials on the basis that it has beneficial secular purposes'").

especially true, where, as here, "these valid secular objectives can be readily accomplished by other [wholly secular] means." Larkin v. Grendel's Den, 51 U.S.L.W. at 4027; see also McGowan v. Maryland, 366 US 420, 449-452 (1961).[9]

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9. Petitioner Lewis testified at trial:

> Q. Let me put it this way. Isn't it true that the Legislature could be called to order and have a few minutes of silence without having a Chaplain do it?
>
> A. No question about it. Or an hour of silence. (Tr. 130).

Petitioners' rush to rely on unnecessary religious means strongly suggests that their "secular purpose" argument is cut from whole cloth, and has little to do with their actual purpose. Even if one were to accept Nebraska's asserted "secular purpose" at face value, it is unclear why state funds must be expended to hire a single official chaplain to deliver the opening prayer. Larkin v. Grendel's Den, supra 51 U.S.L.W. at 4027. Surely an appropriate degree of solemnity could be obtained by using guest speakers as is the practice in 71 of the nation's 99 state legislatures. Brief of National Conference of State Legislatures (NCSL) at 3.

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2. The Subordination of Prayer to Secular Purposes Denigrates Our Religious Heritage.

Confronted by a legal challenge to its chaplaincy practice, Nebraska -- and the Solicitor General as amicus curiae -- have resorted to an ill-considered attempt to defend legislative prayer, not as a religious experience, but as a secular aid in bringing the legislature to order. As respondent has demonstrated, state subsidized prayer may not be justified merely because it incidentally advances a legitimate secular purpose. But petitioner's argument has a further defect.

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Nebraska's lame suggestion that volunteer clergy would be unavailable is wholly unconvincing given the widespread use of volunteer, unpaid clergy in 29 of the nation's 99 state legislatures. Id at 4. There are more than 150 houses of religious worship in Lincoln alone from which volunteer clergy could be solicited. JA 52. Moreover, of course, the goal of legislative order could plainly be furthered without any prayer at all.

Nebraska may not use prayer as a behavior control device. Prayer is among the most intensely personal acts one can perform. To suggest that state subsidized prayer is a valid tool with which to gain a legislator's attention both denigrates our religious heritage and ignores the reason why government must "stay out of the business of writing or sanctioning prayers and leave that purely religious function to the people themselves ..." Engel, supra, 370 U.S. at 435 (emphasis added). To the devout, what petitioners do with prayer is a sacrilege.[10]

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10. As the Lincoln Journal stated editorially in response to the district court's decision, the state's transformation of prayer into the equivalent of a gavel

> really could be the supreme objection to the [Chaplain's] ceremony, constitutional tests aside. Prayer and spiritual exercise are such a deep, personal matter that their employment for secular reasons mocks and debases.

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Unlike the expedient arguments advanced in petitioners' brief, respondent Chambers does not denigrate Reverend Palmer's prayers as the functional equivalent of a gavel. Rather, he respects them for what they really are -- a sincere attempt by Reverend Palmer to seek Divine guidance for the Nebraska legislature.[11]

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Page 8, col. 1 (Dec. 25, 1980). See also Engel v. Vitale, 370 U.S. at 432 ("religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.") (citation to Madison's Remonstrance omitted.)

11. Reverend Palmer candidly admitted the religious purpose of his prayers.

> My purpose there is, during a few moments, to enable the Senators and those around them to pause for a moment and reflect upon the divine significance of their daily doings .... I would say that I strive to relate the Senators and their helpers to the divine ... My purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In

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Whether or not such an appeal for Divine legislative guidance may take place in a voluntary, non-discriminatory manner at no cost to the state is a problem of no small difficulty. But where the state harnesses for its own purposes an appeal for Divine guidance at state expense under the leadership of a paid, official legislative chaplain, the state violates the Establishment Clause.

B. Nebraska's Employment of an Official, Paid Chaplain Over an Extended Period of Time to Deliver Denominational Prayers as an Integral Part of Each Legislative Session Has the Principal and Primary Effect of Advancing Religion.

Nebraska argues that paying an official chaplain to recite prayers at the opening of each legislative

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order that the divine wisdom might be theirs as they conduct their business for the day. (Palmer Dep. 20, 28, 46).

session does not "advance" religion, but merely acknowledges the role of religion as an "inspirational" force. (Pet. Br. 28-29). Where, however, as here, a state directly sponsors and subsidizes prayer in a highly visible setting fraught with symbolic significance, it is absurd to suggest that it does not advance religion.

1. State Sponsored and Subsidized Prayer Is By Definition an Advancement of Religion.

This Court has consistently recognized that the expenditure of state funds to support overtly religious activity constitutes an advancement of religion. As Justice Black wrote for the Court in Everson v. Board of Education, 330 U.S. 1 (1947):

> The "establishment of religion" clause of the First Amendment means at least this ... No tax in any amount, large or small, can be levied to support any religious activities or institutions.

330 U.S. at 116.

Following Justice Black's admonition, this Court has repeatedly invalidated attempts to expend public funds whenever a possibility existed that the funds might be used to subsidize worship or some other overtly religious activity. Thus, in Lemon v. Kurtzman, supra, this Court invalidated a 15 percent salary supplement to teachers of secular subjects in parochial schools because the funds might subsidize religious activity. If such a limited cash grant to a secular teacher in a parochial school has the effect of advancing religion, then surely cash payments to an official state chaplain to enable him to lead the State Legislature in prayer advances religion as well. In Tilton v. Richardson, this Court invalidated a portion of a federal statute providing for cash grants to sectarian colleges because the funds were to be used to build

facilities which might be used for worship twenty years in the future. 403 U.S. at 683. If such a potential subsidy of religious activity constituted an impermissible "advancement" of religion, surely the direct payment of a salary to an officially designated clergyman to permit him to lead the legislature in prayer constitutes an advancement of religion, as well.

In the years since Lemon and Tilton, this Court has repeatedly refused to permit the expenditure of state funds which might aid an overtly religious function.[12] The Court has consistently enforced the

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12. Levitt v. Committee for Public Education, 413 U.S. 472 (1973) (cash grants to parochial schools for grading examinations); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (cash grants to parochial schools for building maintenance; tuition tax credits); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition rebates); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of instructional materials); Wolman v. Walter, 433 U.S. 229 (1977) (reimbursement of field trip expenses, loan of instructional materials.)

rule that state aid to religious institutions is permissible only when it is certain that it "will be used exclusively for secular, neutral, and non-ideological purposes," Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973), cited with approval in Larkin v. Grendel's Den, supra, 51 U.S. L.W. at 4028, and where the recipient could guarantee the payments were incapable of use in subsidizing an overtly religious activity. Thus, in Tilton v. Richardson, supra, Hunt v. McNair, 413 U.S. 734 (1973), and Roemer v. Board of Public Works, 426 U.S. 736 (1976) this Court upheld cash grants to sectarian universities only after determining that the funds could not be used to subsidize worship. Most recently, in Committee for Public Education v. Regan, 444 U.S. 646 (1980), this Court upheld

direct reimbursement of a parochial school for the cost of grading required standardized tests only after determining that the funds could in no way be used to subsidize overtly religious activity. See also Larkin v. Grendel's Den, supra. Nebraska concededly uses state funds to sponsor and subsidize prayer. Given this Court's painstating refusal to tolerate far less objectionable subsidies, one can hardly imagine a more impermissible advancement of religion than Nebraska's chaplaincy practice.[13]

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13. By contrast, in Walz v. Tax Commission, on which petitioners and the Solicitor General place their principal reliance, the Court emphasized that the "aid" which a tax exemption arguably provided a church was not the forbidden "sponsorship" of religion because it was afforded not only to churches but rather to "a broad class of property", including hospitals, libraries and patriotic groups. 397 U.S. at 673. The opinions in Walz leave little doubt that direct state subsidization of prayer, rather than of a broad class of non-profit activities of (continued on following page)

2. The Nebraska Practice Has the Symbolic Effect of Advancing Religion Generally.

Respondent has demonstrated that Nebraska's expenditure of funds to subsidize a "specifically religious activity in an otherwise substantially secular setting" falls squarely within this Court's definition of "advancement of religion". Hunt v. McNair, 413 U.S. at 743. However, as this Court recently

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which churches were only a smaller part, would have been struck down as violative of the neutrality principle of the Establishment Clause. See, e.g., id at 673 675-76; id at 696-97 (Harlan, J.). Thus, if Nebraska had a practice of inviting and paying speakers from a variety of fields to open legislative proceedings, certainly the First Amendment would permit the inclusion of religious figures along with secular figures. See generally Widmar v. Vincent, supra. Nor does this case raise the propriety of expending state funds to permit individuals confined to prison or in the military service to exercise their religion freely. No suggestion has been made -- nor could one be -- that legislators require a state funded chaplain in order to exercise their religion. See generally Schempp, 374 US at 296-298 (Brennan, J., concurring).

held, Larkin v. Grendel's Den, Inc., one need not actually expend state funds to improperly advance religion. It is enough to "provide a significant symbolic benefit to religion", 51 U.S.L.W. at 4028.

Petitioners' program provides such an impermissible symbolic benefit. Even beyond the mere prayer, which itself gives the impression that the State believes there is a God to whom prayers should be offered, the creation of the state funded chaplaincy "provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Larkin, 51 U.S.L.W. at 4028. See also Stone v. Graham, supra, 449 U.S. at 42 (emphasis added) ("the mere posting of [the Ten Commandments] under the auspices of the legislature provides the 'official support of the State... Government' that the Establishment Clause prohibits. [Schempp, supra,

374 U.S.] at 222.")

Moreover, the chaplaincy program, with its prolonged retention of one chaplain, gives the impression that the chaplain's religion is the official religion of the State, or at least a favored one. This symbolism is inevitable because petitioners have placed "the power, prestige and financial support of government behind a particular religious belief." Engel, supra, 370 U.S. at 431. See also Stone v. Graham, supra.

In Larkin, Massachusetts authorized a church to veto the grant of a liquor license within 500 feet of a place of worship. This Court ruled that although the state might well enact a zoning ordinance regulating the sale of liquor in the vicinity of houses of worship, it could not delegate legislative power to a church without violating the Establishment Clause by giving the appearance of

symbolically reaffirming the importance of religion. 51 U.S.L.W. at 4078.

Nebraska has symbolically affirmed the importance of religion far more directly than by delegating a portion of its zoning authority to a church. Nebraska has vested an official chaplain with the power to lead the Legislature in public prayer at the beginning of each legislative session, and has emphasized the significance of the religious ceremony by both including it in the normal order of business of each legislative day and reprinting the prayers at state expense. If Nebraska required that every legislative session be commenced by a short inspirational talk by a football coach or a disabled person, instead of by a clergyman, the symbolic significance of its choice would be obvious; but in these cases, no provision of the Constitution

would condemn the symbolism. The decision to confine the opening speaker to a clergyman who leads the legislators in worship is no less a symbolic affirmation of religion. Both the chaplain and the religious symbols themselves (prayers) constitute a state-financed reinforcement and sponsorship of religion which provides "the appearance of a joint exercise of legislative authority by Church and State" condemned by this Court in Larkin, 51 U.S. L.W. at 4028.[13]

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13. Although petitioners attempt to draw comfort from the fact that "Respondent is free to absent himself during the offering of the morning prayers (Pet. Br. 30), "'the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims.'" Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 786, citing Schempp, supra, 374 U.S. at 288 (Brennan, J., concurring). See also Engel, supra, 370 U.S. at 430-31. The symbolic union of

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3. Nebraska's Practice has the Effect of Advancing a Single Denomination or Group of Denominations.

Nebraska's practice not only constitutes a symbolic advancement of religion generally, it also declares an official preference for a specific set of sectarian beliefs by conferring the state's imprimatur upon a single "official chaplain" for an extended period of time. The existence of an official chaplain whose prayers have opened each session of the legislature for the past 16 years inexorably places the imprimatur of the state upon the favored religious denomination.

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church and state violates the Establishment Clause regardless of the availability of individual exemption.

Petitioners conceded at trial that an "official" chaplain will almost inevitably reflect the dominant faith in the political community. (JA 26, 29-30, 36, 62, 69-71.) The public record confirms the wisdom of petitioners' concessions. In Nebraska, the dominant faith is Protestant, and no one except a Protestent has ever served as the Legislature's official chaplain. In Massachusetts, on the other hand, where the dominant faith is Catholic, the official chaplains of both houses of the Massachusetts Legislature are, and always have been, Catholic. Colo v. Treasurer and Receiver General, supra. In the United States Congress, both "official" chaplains have mirrored the majority Protestant faith of the nation.[14]

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14. Both congressional chaplains have always been Protestant except for a brief
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The pattern is clear. Where the majority chooses an official chaplain, it will, understandably, select a chaplain who mirrors its own religious beliefs.[15] Such a decision, however, can only reinforce the prestige and power of the majority's sectarian beliefs, in flat disregard of the Establishment Clause. In a very real sense, by employing Reverend Palmer for 16 years as its official legislative chaplain and by empowering him to open each legislative session with a public denominational prayer, Nebraska has dramatically advanced religion,

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period in 1832, when a Catholic served.

15. Cf. Lemon v. Kurtzman, 403 U.S. at 622 ("It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.") The survey of the National Conference of State Legislatures discloses that some legislatures, apparently by rule or tradition, specifically
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Christianity in general, and the Presbyterian Church in particular, in violation of "the clearest command of the Establishment Clause ... that one religious denomination cannot be officially preferred over another." Larson v. Valente, __ U.S.__, 102 S.Ct. 1673, 1683 (1982).[16]

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provide for chaplains of certain faiths. For example, the Colorado Senate has one rabbi and two Protestant ministers; the Missouri House of Representatives has a Protestant minister and a Catholic Priest. See Brief of NCSL 3.

16. Compare Walz v. Tax Commission, supra, where the Court emphasized that New York's broad exemption of non-profit institutions from property taxation did not "single out one particular church or religious group". 397 US at 672-73.

c. Nebraska's Employment of a Paid, Official Chaplain for an Extended Period of Time to Deliver Denominational Prayers as an Integral Part of Each Legislative Session Inevitably Fosters an Impermissible Entanglement Between Church and State.

The basic purpose of the Establishment Clause is two-fold: (1) the limitation of Church influence in secular affairs and (2) the protection of religious independence from state encroachment. See generally Everson v. Board of Education, supra; Engel v. Vitale, supra; and Walz v. Tax Commission, supra. We have already seen, supra at 33, the great temptation which exists to use religion as a handmaiden of government. Indeed, that is exactly what Nebraska claims to have done. Where, as here, religion becomes inextricably intertwined in the legislative process, the degree of entanglement

between church and state becomes wholly unacceptable.

Two examples disclosed by the record in this case illustrate the extent of the entanglement. In 1979, after Reverend Palmer, a Presbyterian, had served as Nebraska's legislative chaplain for 14 years, several members of the Legislature sought to replace him with another minister. The resulting contest was resolved by an election on the Senate floor which pitted a Lutheran clergyman against a Presbyterian clergyman for the position of "official" chaplain. [Tr. 8-9]. One can hardly imagine a clearer case of impermissible entanglement and a clearer invitation to religious divisiveness. In 1980, after a prayer delivered by a guest chaplain which had stressed the divinity of Jesus, several Jewish

members of the legislature felt compelled to express their discomfort to Reverend Palmer. (JA 49) Given the official nature of his position, Reverend Palmer felt constrained to alter his prayers to suit the religious sensibilities of members of the Legislature. While his response was personally generous, the controversy illustrates the degree to which Reverend Palmer's official duties forced him to alter his religious beliefs for political reasons. Where official obligation dictates the content of a clergyman's prayer, the entanglement between church and state has reached unacceptable proportions.[17]

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17. Reverend Palmer's alleged recent decision to make his prayers more Judeo-Christian highlights the entanglement problem. He has the absolute discretion to do so, and his successor will have the same discretion to reverse that decision. Although petitioners strangely attempt to rely repeatedly on the fact that "no input is provided with respect to the preparation of the prayers, that matter being (continued on following page)

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left entirely to the Chaplain," Pet. Br. 31, see also id 17, 31, this relinquishment of secular control to a religious authority demonstrates the Establishment Clause violation a fortiorari. In the words of Larkin, 51 U.S.L.W. at 4028, "the [Chaplain's] power under the statute is standardless .... That power may therefore be used ... for exclusively religious goals ... '[T]he potential for conflict inheres in the situation.'" (citation omitted).

Ironically, petitioners seek to justify their prolonged retention of one chaplain on entanglement grounds, arguing that the selection of a chaplain at more frequent intervals would "embroil" the Unicameral "with religion." (Pet. Br. 38-39). This argument proves the very point respondent is making, conceding that the choice of chaplains is inherently a religious decision.

II. HISTORY DOES NOT VALIDATE THE NEBRASKA CHAPLAINCY PRACTICE.

Apparently recognizing the futility of seeking to defend the expenditure of government funds to support a single official legislative chaplain for an extended period of time under the Lemon test, the Solicitor General seeks to establish a general historical exception to the Establishment Clause for the institution of legislative prayer. Disregarding the language of the Establishment Clause and the neutral principles of this Court's opinions, the Solicitor General argues that the existence of 200 years of legislative prayer, dating from the founding of the Republic, must be given controlling weight. But although the historical practice of other branches of government may be of assistance in resolving close cases, it can never relieve this Court of the duty to reach an independent and contemporaneous determina-

tion of constitutional law.[18] It is,

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18. "In the application of a constitution ... our contemplation cannot be only of what has been but of what might be." Weems v. United States, 217 U.S. 349, 373 (1910). See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954)(finding views of Fourteenth Amendment framers concerning school segregation only of limited value); New York Times v. United States, 403 U.S. 713 (1971)(broad interpretation of First Amendment despite early congressional enactment of Alien and Sedition Acts). Religious practices which in the past found no opponents could be highly objectionable today. As Justice Brennan has noted:

> [The constitutional framers] knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship no God at all .... In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Schempp, supra, 374 U.S. at 240-41 (concurring opinion)(citations and footnotes omitted). Where in 1789 there were only a handful of religious sects in the coun-

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however, unnecessary to confront the relationship between historical practice and constitutional adjudication in this case, since the Solicitor General's appeal to settled historical practice fails even on its own terms.

First, no settled current practice exists of using a single, official, non-rotating chaplain to lead legislators in prayer at the commencement of each legislative session. As with petitioners' legal argument, the Solicitor General makes an argument, not for the case actually before this Court, but for the one he wishes were before it. The bulk of the Solicitor General's data establishes nothing more than a willingness to permit rotating, generally volunteer, non-official clergy

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try, almost all of them Protestant, "[t]oday, authorities list 83 separate religious bodies, each with a membership exceeding 50,000 existing among our people, as well as innumerable smaller groups." 374 U.S. at 214.

to engage in voluntary prayer prior to the commencement of a legislative session. Whatever the serious constitutional issues raised by such a non-discriminatory religious practice, they pale in comparison with Nebraska's practice of utilizing a paid, official and permanent legislative chaplain.

The careful survey of the NCSL makes clear that the Solicitor General's claims concerning current practice are myopically Washington-centered and seriously misapprehend the national consensus. Seventy-one of the 99 state legislative bodies have rejected the Nebraska model in favor of a voluntary, non-official, non-discriminatory chaplaincy. Brief for NCSL 23. Even the 28 legislative bodies which retain chaplains do not ordinarily permit them to serve for lengthy periods: "most have briefer tenures in keeping with their ceremonial status."

Id. at 4. Twenty-nine legislative bodies maintain invocations by clergy without providing any expenditure of public funds. Id. Adoption by fewer than one-third of our state legislative bodies hardly qualifies as an overwhelming mandate. If anything, contemporaneous practice dramatically rejects the Nebraska model.[19]

Second, the Solicitor General's history is no more persuasive than his canvass of current practice. It is true that the first session of the Continental Congress resolved to open its third day with a prayer by Reverend Jacob Duché, an Episcopalian clergyman, and that the practice ripened into the formal appointment of Reverend Duché as chaplain to Congress in 1776. 1 Journals of the Continental Congress (Journals) 26 (1774); 5 Journals

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19. For this reason, petitioners' reliance on Walz v. Tax Commission, supra, is singularly misplaced.

530 (1776); 6 Journals 886-887 (1776). It is equally true, however, that the practice of legislative prayer at the first Continental Congress was opposed by John Jay, who was to serve as the First Chief Justice of the United States Supreme Court, and by John Rutledge, who was to serve as Chairman of the Committee on Detail at the Constitutional Convention, as an Associate Justice of the United States Supreme Court from 1789 to 1791, and as Chief Justice of the Supreme Court of South Carolina from 1791-1795.[20] See Letter from John Adams to Abigail Adams (Sept. 16, 1774), reprinted in P. Smith,

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20. Rutledge was nominated to serve as Chief Justice of the United States Supreme Court in 1795, but the Senate declined to confirm him because of his outspoken opposition to the Jay Treaty. The Committee on Detail under Rutledge is credited with preparing the first draft of the Constitution.

1 Letters of Delegates to Congress, 1774-1789, at 74 (1976).

Thus, two of the leading legal minds of the infant Republic challenged the legislative chaplaincy at its inception. Moreover, at the Constitutional Convention itself, no move to inject prayer into its proceedings took place until more than one month after the Convention assembled. When Benjamin Franklin proposed a resolution that each day's session commence with a prayer, the delegates declined to act on it. J. Elliott, Debates on the Adoption of the Federal Constitution 235-255 (2d ed. 1836). Given the significant roles played by John Jay and John Rutledge as delegates to the Convention, its failure to provide for opening prayers was not sur-

prising.[21]

Although petitioners and the Solicitor General rely heavily on the adoption of a chaplaincy by the First Congress, the practice it adopted highlights the invalidity of Nebraska's chaplaincy.[22] The First congress was sensitive to the constitutional dangers of its chaplaincy, and relied on three factors in an attempt to eliminate a symbolic establishment.

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21. Only one of the ratifying conventions appears to have utilized a paid, official chaplain in the Nebraska mold. Debates and Other Proceedings of the Convention of Virginia 13 (June 2, 1788); 3 J. Elliott, supra at 1. The majority of the ratifying conventions appear to have dispensed totally with prayers.

22. Before ascribing constitutional omniscience to the First Congress, it is well to remember that the provisions of the Judiciary Act of 1789 which were invalidated in Marbury v. Madison, 1 Cr. 137 (U.S. 1803) were the work of the First Congress.

First, Congress required the House and the Senate to select chaplains of different denominations; second, Congress required rotation of these chaplains from chamber to chamber on a weekly basis;[23] and third, Congress did not make its chaplains officers of the House or Senate.[24] By contrast, Nebraska has no provision requiring even the yearly selection of different chaplains; has retained the same chaplain for 16 years; and makes the chaplain an Officer of the Legislature.

More fundamentally, James Madison, a member of the First Congress and a prin-

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23. Journal of the Senate, 1st Cong., 1st Sess. 12 (1789); 1 Journal of the House, 1st Cong., 1st Sess. 16 (1789). See also Act of Sept. 22, 1789, Ch. XVII, 1 Stat. 70-71.

24. "The Chaplain was not originally an officer of the House or of the Senate, but became one in 1856." A. Hinds, Precedents of the House of Representatives of the United States, § 275 (1907). See also id. §§ 190, 273-74, 276-82.

cipal architect of the Bill of Rights, realized that the First Congress' appointment of even a rotating non-official chaplain was inconsistent with the principles of religious freedom for which he had so vigorously campaigned. In a voice that speaks authoritatively of the true meaning of the Establishment Clause, Madison reminds us:

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom? In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and

> conducted by Ministers of religion paid by the entire nation? ... [I]t be proper that public functionaries, as well as their Constuents should discharge their religious duties ... at their own expense.

J. Madison, Detached Memoranda, quoted in L. Pfeffer, Church, State and Freedom, 248-49 (Beacon Press rev. ed. 1967).[25]

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25. Thus although Madison did briefly retreat from his position in the Remonstrance, and vote to permit a legislative chaplain in the First Congress, he subsequently came to the conclusion that Congress' chaplaincy program was unconstitutional. Indeed, it appears that he had objected from the outset to using public funds for the chaplain's salary. In a letter written to Edward Livingston in 1822, Madison said:

> I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction ... This has always been a favorite principle with me; and it was not with my approbation, that the deviation from it took place in Congs. when they appointed Chaplains to be paid from the Natl. Treasury.

9 Writings of James Madison 100 (G. Hunt, ed. 1910).

Third, the Solicitor General's appeal to tradition is no more compelling than his attempt to appeal to contemporary practice and historical evidence. Even if our tradition were factually similar to the Nebraska practice before the Court (it is not, since fully two-thirds of the states reject the Nebraska model), tradition cannot be relied upon here since the continued existence of the legislative chaplaincy is a tribute not to its enduring legal virtue or a consensus supporting its constitutional validity but to restrictive rules of standing which rendered it impregnable to judicial review until the modern era, and which the Solicitor General continues to interpose to block review of the congressional chaplaincy. During the 19th century, no judicial challenges to the legislative chaplaincy were reported because, under prevailing stand-

ing doctrine, none were possible. However, agitation over the practice was sustained and widespread, leading to the temporary abolition of official chaplains by both houses of Congress during the 1850s. See generally, Cong. Globe, 35 Cong., 1st Sess. 14, 28 (1857). For a description of the sustained attack on the concept of an official congressional chaplain, see, e.g., H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850); S.Rep. No. 376, 32nd Cong., 2d Sess. (1853); H.R. Rep. No. 124, 33rd Cong., 1st Sess. (1854). In the twentieth century, attempts to challenge the concept of an official paid chaplain foundered, once again, on the standing doctrine. Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928); Murray v. Buchanan, appeal pending, No. 81-1301 (D.C. Cir.). With the recognition in Flast v. Cohen, 392 U.S. 83 (1968) of taxpayer standing in certain Establish-

ment Clause cases, judicial review of the extent to which state funds may be expended on an official legislative chaplain has proceeded in a normal course.[26] While courts have been sympathetic to the concept of permitting voluntary and non-discriminatory prayer prior to a public function, Widmar v. Vincent, supra, Colo is the only case to uphold the use of a paid, official chaplain who functions as an integral arm of the Legislature.

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26. E.g., Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979)(voluntary prayer by unpaid, rotating clergy at public meetings goes to verge of Establishment Clause); Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981)(same); Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974)(same); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968)(same). See also Colo v. Treasurer & Receiver General, 392 N.E.2d 1195 (1979)(upholding paid, official chaplaincy under Equal Protection Clause) and Murray v. Buchanan, supra (challenging congressional chaplaincy).

In sum, the historical evidence, far from supporting the Nebraska chaplaincy, condemns it on the authority of James Madison, John Jay, John Rutledge and the members of the Constitutional Convention. It also condemns it on the authority of the First Congress itself. The same people who established a rotating chaplaincy in 1789 would disapprove of Nebraska's program today for the same reasons which motivated their initial choice.

Thus, whether viewed from the perspective of currently prevailing practice, historical perspective, or tradition, no basis exists to suggest that Nebraska's chaplaincy practice is entitled to an exemption from the strictures of the Establishment Clause.

Although couched as an appeal to history and tradition, the Solicitor General's position is, at bottom, an appeal for deference to legislative

judgment as to the meaning of the Constitution. Since, he argues, Congress and seventeen state legislatures have long believed it constitutional to expend funds for an official chaplain to lead the Legislature in prayer, this Court should ignore the palpable violation of the Establishment Clause inherent in such a practice and defer to legislative will. Such a suggestion wholly misperceives the role of the judiciary in our system of government. While deference should, of course, be accorded to the considered judgments of coordinate branches (and state legislatures), it is the duty of this Court to say what the law is.

The judgment of the Congress is a majoritarian judgment. If the majority is asked whether government funds may be expended to advance its religious beliefs, the majority will often answer "yes". That is why Madison recognized that it

was necessary to place a prohibition on majority attempts to "establish" religion in the first place. The essence of our form of government is that the majority's answer to whether the Establishment Clause permits paid, official legislative chaplains cannot be final. The duty to construe the Establishment Clause is vested not in the majority, but in this Court, and the Solicitor General's invitation to abdicate that duty by deferring to the will of the majority is a prescription for constitutional disaster.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Petitioners are compelled to set straight several factual inaccuracies contained in respondent's statement of the case. The legislative chamber prior to the chaplain's invocation is characterized by a general milling about, some legislators standing and some sitting, and while most stand when the chaplain begins, not all listen or even heed the fact that the invocation is being offered (R 80-82, 121-122).

Legislative prayer books were printed on three occasions as a result of separate motions from the floor and were intended for distribution primarily to the legislative membership as is evidenced from the scant number of copies authorized in each of those three years. Any public requests for copies of the prayer book were honored as the supply would permit (JA 13). There is no evidence of the denomination of any other clergyman considered for the post of Chaplain in 1979.

Executive Board Chairman Lewis testified that *he* knew of no prior non-Christian chaplains (JA 69), but he also testified that he had only served in the Legislature since 1972 (TR 108) and there is no other evidence regarding denominations of prior chaplains. While Lewis testified that he was not sure the Legislature would approve of a Buddhist Monk or a Sioux Indian Medicine Man providing the morning invocation each day for 15 years (JA 69-70), he did not state that the Legislature would completely object to such persons, nor did he concede that most legislators would object to a non-Christian being appointed chaplain as respondent flatly asserts on page 2 of his brief.

Finally, in all his 16 years in service as chaplain, Palmer's prayers have on only one occasion offended anyone, and then only one Jewish senator (JA 49).

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ARGUMENT

I.

Respondent's argument that the Nebraska legislative prayer practice inherently is a "religious activity" forclosed by the Establishment Clause simply because it employs prayer has no basis either in the authority or the record.

Respondent's central argument is that prayer, apparently in any context, by definition is always a "religious activity" which can have no other effect but to advance religion in the manner prohibited by the Establishment Clause, and with which government for that reason cannot be associated. The several variations on this theme employed in his brief cannot obscure the fact it calls into question only the use of prayers by the Legislature. The prayer issue is outside the scope of the question presented for review as framed by this court and is improper for consideration herein.

At trial, respondent based his challenge to the legislative prayer practice on a single issue—the propriety of the use of prayers (JA 13). The district court clearly validated the saying of the prayers, per se (Pet. App. 13, 20), and that specific question was raised by respondent on cross-appeal to the Eighth Circuit Court of Appeals (JA 17). That court just as clearly declared it did not hold the prayers alone to be unconstitutional, citing and discussing its early decision of *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979) (Pet. App. 37). *Bogen* had involved prayers opening county board meetings by volunteer clergy and the Court of Appeals had found such use

of prayers to advance a clearly secular purpose of establishing a solemn atmosphere and serious tone for the meetings, going so far as to suggest that this was the primary effect of all invocations at such public gatherings of persons with different views on religion (Pet. App. 35-36).

Respondent did not pursue the prayer issue before this court by cross-petition for writ of certiorari, and in its limited grant of petitioners' application the court framed the question presented as whether the compensation or retention of a single chaplain for an extended period of time invalidates the Nebraska legislative prayer practice (JA 109). Rather than direct his attention to that question, respondent puts forth an argument that not only falls outside the scope of the question presented, but also amounts to a separate basis for invalidating the legislative prayer practice, the effect of which would be to broaden the judgment of the Court of Appeals in his favor. Such a result cannot be countenanced. *See, Mills v. Electric Auto-Light Co.*, 396 U. S. 375, 381, n. 4 (1970); *Strunk v. United States*, 412 U. S. 434, 437 (1973).

Even if considered, the argument fails on the merits. It pends on the proposition that because of its content, a prayer necessarily advances religion.[1] That this propo-

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1 This argument also implies that "prayer" is susceptible to definition, yet respondent's own evidence proves otherwise. References to deity, on which he concentrated attention in this case, do not control the definitional question, for his own expert witness testified that any utterance expressing one's feelings for "the unknown or the mysteries of life or the universe itself or cosmos" (JA 37) might be considered prayers, and he

(Continued on next page)

sition is nonsensical is easily demonstrated. It would invalidate the reading of the same prayers during the course of a legislative filibuster, though such a practice obviously could not be said to advance religion. Respondent does not recognize that the very articulation of the tripartite test in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), manifests a reluctance to conclude that any particular activity can be deemed definitionally to advance religion in every context. Moreover, in drawing distinctions between impermissible activities of a religious nature and permissible ones this court on several occasions has referred specifically to legislative prayers as examples of the permissible.[2] Respondent's failure even to acknowledge these expressions is conspicuous.

More notably, the very cases cited by respondent undercut his argument. It is true that this court acknowledged the religious nature of the regent's prayer at issue in *Engel v. Vitale*, 370 U. S. 421 (1962), but it also found that the state admitted the prayer was in furtherance of an official policy of spiritual training in the public schools, *id.* at 422, which was characterized as "an officially approved religious doctrine of the state." *Id.* at

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further added that utterances without references to deity could nonetheless be prayerful simply because of "the mood that is created, the beauty of the statements themselves, the contemplative aspect of them." (JA 38).

2 *McCollum v. Board of Education*, 333 U. S. 203, 253 (1948); *Zorach v. Clauson*, 343 U. S. 306, 312-13 (1952); *Engel v. Vitale*, 370 U. S. 421, 435 (1962); and Mr. Justice Stewart's dissent at 446; *School District of Abington Township v. Schempp*, 374 U. S. 203, 214 (1963), and Mr. Justice Brennan's concurrence at 299-300.

436. Similarly, the religious nature of Bible readings in the public schools of Pennsylvania and Maryland was recognized in *School District of Abington Township v. Schempp,* 374 U. S. 203 (1963), but in striking that practice down the court was careful to point out findings of fact that the readings were intended or admitted by those states to serve as genuine religious ceremonies. *Id.* at 223-224. In fact, the court suggested that under different circumstances such readings might be permitted for inspirational purposes or for the teaching of secular subjects. *Id.* at 223.

In *Epperson v. Arkansas,* 393 U. S. 89 (1968), also cited by respondent, this court rejected that state's attempt to prevent school teachers from discussing the theory of evolution, but only after determining that "no suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-108.

In each of these cases, the prayers, readings, or teachings involved were not examined in a vacuum, but were determined impermissible only because they furthered an underlying religious purpose which itself was established in the record as a matter of fact. No such underlying purpose or effect is present here as was specifically found by the district court upon review of all relevant facts and circumstances (Pet. App. 13-15).

II.

Respondent's argument on "primary effect" is grounded on misinterpretations of decisions which involve activities so dissimilar from that at issue herein as to be inapplicable in any event.

Acknowledging that resolution of this case will turn principally on the issue of primary effect, respondent makes two arguments in that regard. The first—that there is an impermissible effect simply because prayer is involved—has just been dispatched. When he finally turns attention to the compensation and tenure of the legislative chaplain—the only issues actually before this court—he grounds his arguments on language abstracted from decisions of cases involving facts and circumstances wholly dissimilar to those herein.

A. Larkin v. Grendel's Den, Inc., Did Not Espouse Any Doctrine of Symbolic Benefit to Religion as Respondent Suggests and This Case Does Not Lend Itself to Disposition Under the Controlling Principles of That Decision.

Respondent's contention that the Nebraska Legislative prayer practice provides a significant symbolic benefit to religion generally, tantamount to a primary effect advancing religion, is grounded on the application of this court's recent decision of *Larkin v. Grendel's Den, Inc.*, 51 U. S. L. W. 4025 (1982). He perceives that decision to announce a new doctrine of Establishment Clause law to the effect that any involvement of government with re-

ligion which might give the appearance of symbolically reaffirming the importance of religion is impermissible (Brief of Respondent, pp. 44-45).

Respondent grossly misconstrues *Larkin*. The Massachusetts statute there in question granted churches power to veto certain liquor license applications. The court carefully pointed out that this was a discretionary governmental power, ordinarily vested in agencies of government, which had been transferred to religious institutions, with the result that such institutions were empowered to prescribe certain rights, obligations, and burdens among the public having nothing to do with religion and subject to no overriding standards.

The Nebraska legislative prayer practice stands in stark contrast to the situation encountered in *Larkin*. The practice involves no function or power of government vis-a-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs. Moreover, religious institutions play no role here, the chaplain serving in his individual capacity rather than as a representative of his church (JA 50-51). This is not changed by the fact of either his compensation or tenure. Any benefit to religion resulting therefrom surely is only of an incidental nature and permitted by the First Amendment. *Roemer v. Board of Public Works*, 426 U. S. 736, 746-747 (1976).

The reference to a symbolic benefit to religion made by the court in *Larkin*, and seized upon by respondent,

neither was the determinative factor in that case, nor an attempt to espouse a new doctrine of Establishment Clause law. There is no indication that the court would find similar symbolic benefit to religion in any situation that did not involve granting religious institutions the very power and authority to govern. Respondent has failed to heed the admonition of this court in an earlier Establishment Clause case of which he was reminded by the district court (Pet. App. 16):

> In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz v. Tax Commission, 397 U. S. 664, 668 (1970).

B. Respondent's Conclusion That the Compensation and Tenure of the Nebraska Chaplain Amounts to an Official Preference For One Religious View Has Support Neither in the Record Nor Controlling Authority.

Respondent actually makes only one argument regarding primary effect addressed to the precise question presented herein, the compensation and tenure of the Nebraska chaplain. On pages 47-50 of his brief, he characterizes the retention and compensation of Chaplain Palmer for 16 years as an official preference for one re-

ligious sect, apparently felt prohibited by *Larson v. Valente*, — U. S. —, 102 S. Ct. 1673 (1982).[3]

Petitioners first point out that the facts upon which this argument is grounded are not found in the record. He states that the dominant faith in Nebraska is Protestant and that no one except a Protestant has ever served as chaplain. There is no evidence in the record bearing out these points. He also asserts that in Massachusetts the chaplains of both houses have always been Catholic, citing *Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195 (1979). The court therein plainly found "that not all legislative chaplains in Massachusetts have been Roman Catholic." *Id.* at 1199.

In addition to factual inaccuracies, respondent misapplies *Larson* as a matter of law. That case involved a Minnesota statute imposing certain registration and reporting requirements upon only those religious organizations soliciting more than 50 percent of their funds from nonmembers. The threshold question was whether or not the statute resulted in an official preference for certain religious denominations. The court so found on the basis that the statute made "explicit and deliberate distinc-

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3 The logical extension of this argument reveals its irrationality. Since it assumes that a cleric can be identified only with a single denomination, manifested either by his prayers or church affiliation, whether the current chaplaincy is too Christian or Judeo-Christian as Respondent claims actually would be irrelevant. So long as *any* identifiable religion is not reflected in the chaplaincy, some preference by respondent's definition is unavoidable. His confusion stems from the fact that he presents what essentially is an equal protection argument which fails to fit into the framework of the Establishment Clause inquiry. *See, Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195, 1199 (1979).

tions between different religious organizations." *Larson v. Valente, supra* at 1684, n. 23. This determination was concluded consistent with the rule of *Gillette v. United States,* 401 U. S. 437 (1971), to the effect that it is critical to the finding of official preference that a statute *on its face* discriminates on the basis of religious affiliation or belief. *Larson, supra* at 1684, n. 23. In *Gillette,* 401 U. S. at 452, the court also determined that where a challenged statute or activity does not explicitly manifest a preference, none will be found *de facto* so long as there is a neutral, secular basis for whatever lines of distinction have materialized from government action.

Properly viewed, this case hardly is controlled by *Larson.* The legislative rules herein challenged respect only an internal, procedural matter for the Legislature rather than an exercise of legislative power directed at the public, and have nothing whatsoever to do with particular religious institutions, but are concerned only with procuring the personal service of an individual. More significantly, the rules neither explicitly nor implicitly make distinctions between different religious organizations; indeed, they do not even require the chaplain to be a clergyman. Chaplain Palmer's continued retention is not attributable to any preference for Presbyterianism, but rather to the simple fact that he has done a good job providing a daily ceremony never considered a big deal by the Legislature. *See,* Petitioner's Brief, page 38. Thus, there is a neutral, secular basis for his retention.

The only issue genuinely raised in this case regards the possibility of some public perception that Palmer's retention reflects a preference for his particular religious

views. No doubt there are some who might take offense to such a situation, for this court recognized in *Zorach v. Clauson*, 343 U.S. 306 (1952), "A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" *Id.* at 312-313. Nevertheless, in furtherance of a judicial policy of benevolent neutrality between government and religion this court has permitted such indirect, remote or incidental effects on religion, as opposed to direct and immediate effects which realistically advance religion.

Furthermore, to require Chaplain Palmer, simply because of his affiliation with one religious denomination, to be replaced by another chaplain to perform the identical service would amount to nothing less than discrimination against Palmer because of his denominational affiliation. Petitioners once again submit that such a result would contravene the principle of *Bradfield v. Roberts*, 175 U.S. 291 (1899) and *McDaniel v. Paty*, 435 U.S. 618 (1978), upholding the right of a cleric of a particular faith to be in the secular service of government. Respondent's brief fails to address this issue squarely raised by petitioners (*see*, Petitioners' Brief, pp. 39-40).

III.

The contention that the retention of Chaplain Palmer over a several year period manifests the kind of political divisiveness forbidden by the Establishment Clause is specious and grounded on facts not contained in the record.

Respondent's shallow attempt to demonstrate that an impermissible degree of political divisiveness has re-

sulted from Chaplain Palmer's tenure is an obvious over-exaggeration and again relies on facts simply not contained in the record. He notes on page 52 of his brief that after a prayer delivered by a guest chaplain, several Jewish members of the Legislature felt compelled to express their discomfort to Reverend Palmer, when in fact only a single legislator was discomforted by the prayer and even then did not directly communicate same to the chaplain (JA 49).

He also asserts that in 1979, "several members of the Legislature sought to replace" Palmer with a Lutheran clergyman suggesting the existence of a hotly debated issue throughout the legislative chamber (Brief of Respondent, p. 52). Executive Board Chairman Lewis made clear that the 1979 mix-up resulted from confusion over whether the incoming or outgoing Executive Board was to make the recommendation, rather than from any dissatisfaction with Palmer (R118-120). Moreover, nowhere does the record reveal the denominational affiliation of the other cleric, who also could have been Presbyterian.

As this court has indicated, the requisite political divisiveness is found either where the activity in question involves substantive issues which engender serious division along religious lines, or necessitate a degree of continuing oversight and involvement by government which itself is of a politically volatile nature. *See, Lemon v. Kurtzman,* 403 U. S. at 623; *Roemer v. Maryland Board of Public Works,* 426 U. S. at 749, 765-766; and *Meek v. Pittenger,* 421 U. S. 349, 372 (1975). Since the prayer practice is not an exercise of the Legislature's power vis-a-vis the public, but respects only an internal administrative matter, it stretches the limits of credulity to find either of

those facets in this case. Noting that the trial court did not even see a political divisiveness issue from the evidence adduced at trial, how the Court of Appeals could infer it without a single citation to the record is baffling and certainly erroneous.

IV.

This particular case can be resolved by historical considerations unique to legislative prayer practices without announcing a broad new general exception to the application of the Establishment Clause.

To obscure the compelling historical considerations surrounding legislative prayer practices of the kind employed in Nebraska which are illuminated by petitioners and the United States as amicus curiae, respondent passes them off as espousing a broad new exception to the existing body of Establishment Clause law. He also makes an ill-fated attempt to draw significant distinctions between the earliest federal chaplaincies and that employed by the Nebraska Legislature.[4]

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4 Respondent first notes that the earliest chaplains of the Congress rotated from house to house, apparently believing such a practice would tend more toward the permissibility of legislative chaplaincies. To the contrary, as Mr. Justice Brennan pointed out in *School District of Abington Township v. Schempp*, 374 U. S. at 278, n. 54, the absence of rotation suggests the practice has been religiously insignificant. In any event, the fact that the first congressional chaplains were rotated in no way changes the fact that for decades they were all Protestant with one exception and served lengthy individual terms (Brief for United States, pp. 16-17). Respondent's argument misses the relevant point.

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Petitioners and the United States in their respective briefs have demonstrated the particular relevance of history in interpreting the Establishment Clause where a practice challenged today was in existence and approved in identical form by the drafters of the First Amendment

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He also asserts that the early chaplains were "generally volunteer", when the undisputed evidence is that except for a few years in the 1850's they have been paid from the outset, and he contends that the first federal chaplains were not officers of the House or Senate in reliance on the statement contained in Hinds', *Precedents of the House of Representatives of the United States*, § 275, at 153 (1907) (Brief for Respondent, p. 63). The statement respondent relies on is factually inaccurate as further examination demonstrates.

The Hinds' statement is derived from House debate which occurred in 1860. *Id.* § 273, at 152. The debate was over whether the House should abandon the brief experiment in the late 1850's with volunteer chaplains. On February 28, 1860, Representative Millson offered, as a privileged question, a resolution that the House proceed "to elect a Chaplain, who shall officiate during the present Congress, alternately with the Chaplain already elected by the Senate." Cong. Globe, 36th Cong., First Sess. 902 (1860). Representative Burnett objected asserting the question was not privileged because the chaplain was not "an officer of the House, necessary to compete its organization." *Id.* Millson responded "that, from the foundation of the government until the present day . . . the House of Representatives has elected a Chaplain as part of its organization." *Id.* Whereupon the Speaker ruled in favor of Burnett's objection. *Id.*

A week later, Millson renewed his resolution and stated: "The Constitution provides that House shall choose its Speaker and other officers. It is, then, a question of privilege for the House to determine what officers it will choose. I do not say the House must elect the Chaplain; but I say it is for the House to determine whether they will have a Chaplain among its other officers." *Id.* at 992 (1860). The Speaker reversed his ruling of the previous week declaring "[s]ince then, the Chair has looked into the precedents, and finds that they are in favor of the question being privileged." *Id.* at 993. And the House supported Millson's view that "it is for the House to determine whether they will have a Chaplain among its other officers." *Id.*

at the very time of its drafting. (*See,* Petitioners' Brief, p. 24; Brief for the United States, pp. 9-12). To refute the obvious compelling nature of these unique historical considerations, respondent and his amici, *Jon Garth Murry, et al.,* cite the court to its decision in *Brown v. Board of Education,* 347 U. S. 43 (1954) which they note found historical considerations surrounding the issue of segregation in the public schools "inconclusive". Closely examined, *Brown* is seen to actually support petitioners' historical analysis.

The court in *Brown,* prior to its decision, had called upon the parties to discuss at reargument a number of questions, including what evidence existed regarding whether Congress and the states contemplated or did not contemplate that the enactment of the Fourteenth Amendment would abolish segregation in the public schools. After reargument, the court concluded that the presentation of the parties and its own investigation was "inconclusive" on this point, for the reason that the movement toward free common schools supported by general taxation had not yet taken hold at the time of the Fourteenth Amendment. *Id.* at 489-490. Thus, the court in *Brown* did not reject the kind of historical inquiry petitioners suggest here, but found simply that such an inquiry could resolve that particular case.

By contrast, the history of legislative chaplaincies demonstrates that they had "taken hold" by the time Congress proposed the First Amendment. Such practice was approved by the Congress in the form of a compensation

statute only three days before.[5] (see Brief of United States, p. 11). With the two cases so distinguished, and mindful that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the Religious Clause of the First Amendment", *Everson v. Board of Education*, 330 U. S. 1, 26 (1947), the conclusion that the drafters of the Establishment Clause intended that it would permit legislative prayer practices is inescapable.

V.

The printing of legislative prayer books is not a part of the official legislative chaplaincy and was improperly considered by the Court of Appeals.

While petitioners have demonstrated in their main brief that the printing of prayer books on three separate occasions poses no Establishment Clause problem if considered an element of the legislative prayer practice, they did not intend thereby to waive their contention that the prayer books in fact are not part of the practice and were

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5 Respondent notes that not all of the framers of the First Amendment were in favor of legislative chaplains, mentioning Rutledge, Jay, and Madison. This very point actually reinforces the conclusion that while perhaps not the unanimous view, it was the considered judgment of the framers of the First Amendment as a deliberative body that legislative chaplaincies were permitted by the religion clauses. That James Madison may have changed his mind on this question some 30 years later does not obscure the fact that as a member of the first Congress in 1789, he served on the House Committee proposing the appointment of a House chaplain and he voted to compensate the chaplains. *See*, Brief for United States, p. 12.

improperly considered by the lower courts in their decisions. (*See,* Pet. App. pp. 22-23).

Respondent's complaint specifically sought to enjoin the implementation of specific legislative rules and statutes authorizing the very office of legislative chaplain and the compensation of the chaplain (JA 6-7). The common denominator of these activities was their relation to the sole claim he pursued, the unconstitutionality of legislative prayers. The post of chaplain, the compensation of the chaplain, and the funding of prayer books were merely adjuncts to the utilization of prayer.

The district court validated the use of the prayers, but surprisingly in view of respondent's case, found an independent basis for invalidating the chaplain's compensation and the funding of prayer books. Although essentially reaching the same conclusion on the merits, the Court of Appeals specifically rejected the district court's segmentation of the elements of the prayer practice, being of the view that respondent challenged the practice "as a whole" (Pet. App. 33-34). So viewed, the Court of Appeals took into consideration not only the occasional past funding of prayer books, which was not raised on appeal by petitioners (JA 15-16), but went so far as to find "the publishing of prayer books is similarly an impermissible part of such practice." (Pet. App. 38). Thereby, the Court of Appeals committed error.

First, to the extent that a legislative prayer practice "as a whole" is even capable of being discerned, it surely does not include the prayer books. They are required neither by legislative rule nor statute, as is the case with

the other elements singled out by the district court, and it is those rules and statutes which embody any "official" chaplaincy. Rather, the three separate printings of prayer books occurred in prior years as a result of separate motions from the floor of the Legislature, apparently made at the personal whim of the movant on each occasion. There simply has never been any *official* act for respondent to enjoin in that regard. Moreover, since he failed to make every legislator a party to the action, the courts are without the capability of providing him the relief he has requested even if they were inclined to do so.

There is another flaw in the reasoning of the Court of Appeals. While the recommendation of a chaplain and the daily invocations reasonably could have been anticipated at the time of filing respondent's complaint, because they were required by legislative rule, this is hardly the case with the likelihood of any subsequent motions from the floor to again print prayer books. That expectancy was subject to the kind of speculation and conjecture rendering it far from ripe for judicial review. *See, O'Shea v. Littleton,* 414 U. S. 488, 497-498 (1974). This being so, subject matter jurisdiction with regard to this question was and is lacking. In view of the foregoing, and by virtue of respondent's failure to cross-petition for certiorari on this issue, resolution of the question presented herein properly must confine itself to the compensation and tenure of the Nebraska legislative chaplain.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court reverse the decision of the Court of Appeals.

Respectfully submitted,

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral, Petitioners,

By PAUL L. DOUGLAS
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No. 82-23

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IN THE

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DECAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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Question Presented

Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution?*

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* The petition presented three other questions. The order of this Court granting the petition limited the writ of certiorari to the above question, 51 U.S.L.W. 3339 (1982).

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INTEREST OF THE AMICUS

This brief amicus curiae is submitted with the consent of the parties by the American Jewish Congress, a membership organization of American Jews founded in 1918. It has as one of its chief purposes the protection of the religious, political and economic rights of American Jews and the promotion of the principles of constitutional democracy. It is particularly committed to the preservation of the great freedoms secured by the First Amendment, including most particularly the freedoms secured by the establishment and Free Exercise Clauses. It has filed numerous briefs in this Court in cases raising questions under one or both of these clauses.

STATEMENT OF THE CASE

A rule of the Nebraska Unicameral Legislature, Rule 7(A)(1)(b), provides that each legislative day shall begin with a prayer offered by the chaplain. Petitioner Robert E. Palmer, a Presbyterian clergyman, has served as legislative chaplain since 1965, [J.A. 11] and has opened most daily sessions of the legislature with a prayer. A large number of his prayers were overtly sectarian in nature. [J.A. 23; 105-08]

Reverend Palmer is presently paid slightly over $300 a month for his services, which consist solely of opening each day's meeting with a prayer. He has no other duties in his role as legislative chaplain. [J.A. 41] In three years, 1975, 1978 and 1979, the invocations were, by virtue of a resolution passed by the legislature, published at state expense and

distributed to all legislators and to the public. [J.A. 5-6] Petitioner Lewis, a member of the Executive Committee of the Unicameral, testified that a non-Christian had never served as chaplain, and had no chance of being appointed chaplain. [J. A. 26, 69-71]

Reverend Palmer testified that in his prayers he attempted to deal with current issues, in light of the Judeo-Christian heritage [J.A. 44-45; 48; 75] which he termed the "civil religion." [J.A. 75-76; 83] He explained that the forms of religious expression used were common to most Americans. [J.A. 43-45].

Respondent, Ernest Chambers, is a taxpayer and a member of the Nebraska Legislature. He is not a Christian and found himself uncomfortable at the prayers recited by Reverend Palmer. Ordinarily, in

order to avoid this discomfort, he absented himself from the chamber, [J.A. 22-4]

Respondent Chambers sought injunctive relief prohibiting 1) the retention of the current chaplain, 2) the state from paying for the chaplain's salary or for the printing of the prayers and invocations, 3) the legislature from beginning its sessions with a prayer.

The District Court, Chambers v Marsh, 504 F. Supp. 585 (D. Neb. 1980) having rejected a variety of jurisdictional and federalism challenges to its consideration of this case, determined that the Establishment Clause did not prohibit a legislature from opening its daily session with a prayer. However, it ruled that the Establishment Clause prohibited the state from paying the chaplain's salary or for the publication of his invocations. The

Court also found that, although the position of chaplain was currently established only by the internal rules of the legislature, these rules were a law for purposes of the Establishment Clause.

Both petitioners and respondent filed cross appeals with the United States Court of Appeals for the Eighth Circuit. That Court affirmed in part and reversed in part. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982). It agreed with the District Court that the rules of the legislature were a law for purposes of the First Amendment.

However, it found it unnecessary to pass upon the question of whether the legislature could open its sessions with a prayer. Rather, it found that the retention of one chaplain over an extended period of time, and the printing of prayer

books at state expense containing only the prayers he had offered, had the effect of preferring a particular religion to the disadvantage of all others. The Court concluded (675 F.2d at 234):

> [T]he purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time....

Petitioners did not appeal that portion of the District Court's judgment prohibiting the printing of prayer books.

This Court granted certiorari limited to the question of whether the retention of a legislative chaplain of one faith, over an extended period of time to deliver daily invocations in the Legislature, violated the Establishment Clause.

SUMMARY OF THE ARGUMENT

The decisions of this Court have established that government may not symbolically endorse religion in a way which suggests, in the words of Justice Stewart, that it is "throwing the weight of secular authority behind the dissemination of religious tenets." This is particularly so if government suggests that one sect is favored over others.

By selecting and paying a chaplain of one faith over a protracted period, Nebraska has symbolically suggested that this person's faith is the civil religion of the state. When coupled with the printing of this person's prayers at state expense, Nebraska announces to its citizens that the state prefers a particular sect, that it is the official religion of the state, and that its prayers, but not those of others, are properly considered by the legislature, as it undertakes its tasks.

The benefit conferred on that faith -- be it one Protestant sect, Christianity, Judeo-Christianity, or the civil religion, is substantial and direct. Nebraska's practices do not become permissible merely because they are a small step in the institutionalization of state support for religion.

Moreover, while history suggests the possibility that the framers of the First Amendment might not have considered legislative prayers unconstitutional -- a history far less certain than petitioners claim -- nothing in that history suggests that in tolerating legislative prayers, the founders intended to tolerate religious discrimination. Such discrimination, as this Court's decisions establish, and history confirms, lies at the heart of the prohibitions of the Establishment Clause.

Finally, under any view, because of the particular significance that the founders paid to not taxing citizens to support religion, the payment of the chaplain's salary, and the printing of prayer books at state expense are clearly unconstitutional. A holding to this effect would not in any way endanger the existence of prison or military chaplaincies since these are justified by the Free Exercise Clause.

ARGUMENT

INTRODUCTION

The Nebraska legislature's practice of having a paid chaplain of one faith open each day's session with a prayer over an extended period of time raises several principles of Establishment Clause jurisprudence.

The principles at issue in this case are that: 1) symbolic actions can establish religion, 2) where some government contact with religion is unavoidable, government must act with scrupulous neutrality and must not favor one sect or religion over any other, 3) government may not use religious means to achieve secular goals absent a showing that no secular means are available.

I. Symbolic Endorsements of Religion by Government Impermissibly Establish Religion

A majority of this Court's cases under the Establishment Clause involve the permissible limits of state financial assistance to religious institutions, see, e.g., PEARL v. Nyquist, 413 U.S. 756 (1973); Everson v. Bd. of Educ., 330 U.S. 1 (1947). The others generally either concern church-property disputes which, although not explicitly so based, rest on Establishment Clause principles, see, e.g., Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), or attempts by public school authorities to expose their charges to religion, requiring students to assume special burdens to avoid unwanted religious

exercises, see, e.g., Stone v. Graham, 449 U.S. 39 (1980); Engel v. Vitale, 370 U.S. 421 (1962); cf. Valley Forge Christian College v. Americans United, 102 S.Ct. 752, 766 n.22 (1982). But as this Court's recent decision in Larkin v. Grendel's Den, Inc., 51 U.S.L.W. 4025 (1982), makes clear, the Establishment Clause (and the tripartite test), contrary to the suggestion of the petitioner [Brief at 23], apply to, and invalidate, practices beyond funding of parochial schools and conducting religious practices in the public schools.

This case presents the question of whether, by choosing a chaplain of one faith over an extended period of time, and publishing his prayers, the state has

lent its prestige to that faith* in a manner proscribed by the Establishment Clause.

This Court has only recently held that symbolic endorsements of religion by government violate the Establishment Clause, Larkin v. Grendel's Den, Inc., supra, 51 U.S.L.W. at 4028, a case in which the impact of the "symbolic endorsement" (available to all faiths) was far more attenuated than that implied by Nebraska's decision to advantage one

* It is, of course, unimportant in the constitutional sense whether the prayers favor Reverend Palmer's own Presbyterian sect, all Protestants, all Christians, the Judeo-Christian tradition, or the civil religion. School District of Abington Twshp v. Schempp, 374 U.S. 203, 216 (1963). Petitioner Palmer laid heavy stress on the fact that the prayers were non-denominational, by which he apparently meant only that the prayers favored no particular religious group within Christianity [J.A. 61, 76-77; 83].

faith over an extended period of time. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit in the minds of some by reason of the power conferred."*

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* The state and lower federal courts have had extensive experience with the principle that the Establishment Clause prohibits symbolic endorsements of religion. They have ruled that the school prayer cases and their progeny suggest that indirect governmental endorsement of religion is likewise impermissible. See, e.g., Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982, aff'g, 525 F. Supp.1150 (D. R.I. 1981); Conrad v. City and County of Denver, Colo. , P.2d (1982). Fox v. County of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978); ACLU v. Rabun County Chamber of Commerce, Inc., 678 F.2d 1379 (11th Cir. 1982); Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981). But see, e.g., Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973); Citizens Concerned v. City and County of Denver, 508 F. Supp. 823 (D. Col. 1981), app. pending, (10th Cir).

The cases of this Court have construed the Establishment Clause broadly to reach a wide variety of forms of symbolic endorsements of religion so as "to prevent, as far as possible, the intrusion of either church or state into the precincts of the other," Larkin v. Grendel's Den, Inc., supra, 51 U.S.L.W. at 4028, quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)

But even those Justices who would reduce the sweep of the Establishment Clause, Thomas v. Indiana Employment Security Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting); School District of Abington Twshp. v. Schempp, 374 U.S. 203, 308 (1963) (Stewart, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 238 (1948) (Reed, J., dissenting), agree that the irreducible

meaning of the Clause is that it prohibits, in the words of Justice Stewart in Schempp (374 U.S. at 314):

> government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets (footnote omitted)

Thus, government may not throw its support behind religious tenets by formally declaring that one church or the other is the official "state" religion, Everson v. Bd. of Educ., supra, 330 U.S. at 15. The state may not throw its weight behind the dissemination of religious tenets by paying for the operation of religious schools, Wolman v. Walter, 433 U.S. 229 (1977); PEARL v. Nyquist, supra.

And government may not throw its weight behind the dissemination of

religious tenets if its actions create the impression that a particular faith is favored, Larson v. Valente, 102 S.Ct. 1673 (1982) or that its beliefs are worthy of consideration. Larkin v. Grendel's Den, Inc., supra; Stone v. Graham, supra, 449 U.S. at 42. In each of these cases, government establishes religion, in the constitutional sense, no less than if it declares a particular religion to be the official state religion. The rationale for this conclusion is simple:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

II. The State of Nebraska Has In Fact Symbolically Endorsed Religion By Having One Legislative Chaplain for an Extended Period

In this case, Nebraska has thrown its weight behind the religious tenets of a religious sect.* It has announced, over a prolonged period of time, that he is the representative of religion (even if only the civil religion) in the legislature and that the particular religious views he expressed, and the forms of his prayers, enjoy official approval.

Reverend Palmer's prayers typically reflected his own religious conviction,

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* Petitioner Lewis conceded [J.A. 26, 67-71] that it would be practically impossible for a non-Christian to be appointed legislative chaplain. The result is a de facto "religious test" for public office, undoubtedly impermissible under Torcaso v. Watkins, 367 U.S. 488 (1961).

containing, for example, frequent references to Jesus Christ. [J.A. 36-37; 105-08] They were in no sense what is sometimes called "nonsectarian."

Petitioners argue [Brief at 30] that these were not Christian prayers, but reflected the nation's tradition. Petitioner Palmer testified that his prayers were in keeping with the Judeo-Christian tradition, the "civil religion" of the United States, acceptable to most Americans. [J.A. 75-76; 83] That tradition is certainly not acceptable to American citizens who are Muslims, Buddhists or atheists, all of whom are entitled to the protection of the Establishment Clause, particularly because they are not, as petitioner Palmer testified, part of the "vast, overwhelming majority of Americans who

would [not] be offended by such prayers" [J.A. 83].

The Establishment Clause forbids the recognition of a" civil religion," for "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by the civil magistrate," Engel v. Vitale, supra, 370 U.S. at 432, quoting Madison's Memorial and Remonstrance Against Religious Assessments.

Moreover, while the concept of a Judeo-Christian tradition has some meaning as a cultural phenomenon, as applied to liturgy the concept is virtually a contradiction in terms.*

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* Reverend Palmer testified that, in his opinion, Jesus is a major figure in the Judeo-Christian tradition [J.A. 77]. Surely, Jesus is not a major religious figure within the Jewish theological, let alone liturgical, tradition.

Prayer is the most private and intimate expression of a particular faith. As the noted theologian Paul Tillich admitted while arguing for the existence of a Judeo-Christian theological tradition, there is no Judeo-Christian tradition in liturgical matters (Tillich, Is There A Judeo-Christian Tradition, 1 Judaism 106 (1952)):

> There is, of course, a way of understanding -- I would say, misunderstanding -- the meaning of our question, namely, by referring it to the traditions which have developed in both groups .... These traditions, rites, symbols, ... doctrinal statements, ... diverge considerably from each other. But this fact is too obvious to be discussed. It is more a truism than a problem.*

* See also, Heller, The Judeo-Christian Tradition Concept: Aid or Deterrent to Goodwill, 2 Judaism 132 (1953); Cohen, The Myth of the Judeo-Christian Tradition (1970).

Nebraska did not stop at merely allowing petitioner Palmer to continue in office indefinitely. In several years, it published, at state expense, petitioner Palmer's prayers, thus reinforcing the conclusion that these prayers reflected the views of the State of Nebraska.* While it may be argued

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* The petitioners did not appeal from that much of the District Court's order which prohibited the state from paying for the publication of prayerbooks. They did not address the issue in their brief in the court below. Nevertheless, their brief in this Court (pp. 41-44) treats the issue as open for decision.

The publication of these books formed an integral part of the scheme by which the legislature indicated its preference for a particular faith. Respondents, who were successful below, are entitled to rely on these facts here. Stern & Gressman, Supreme Court Practice, § 6.34 (1978); Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 634 n.8 (1980).

that the mere recitation of prayers is not unconstitutional, see pp. 36-37 infra, those arguments simply do not hold for the printing of prayerbooks. A member of the public who obtains a copy of the prayerbook can only conclude that the sect to which Reverend Palmer belongs is endorsed by the state.*

The sum total of the state's actions in this case announces to the world that

* The New York State Senate has once published the invocations offered by clergy of various faiths. A citizen reading that booklet would have difficulty concluding that the state endorsed a particular sect, given the variety of sects represented, even though none of the clergy were Muslims, for example. The amicus does not express a view as to whether New York may constitutionally do what it did. Nevertheless, the amicus believes that the contrast between this pamphlet and Nebraska's highlights the impropriety of Nebraska's actions. A copy of this pamphlet has been filed with the Clerk.

it prefers a particular sect, that it is the "civil religion" of the State, and that its teachings -- but not those of others -- are appropriate for consideration by the legislature as it begins its daily tasks.

Petitioners object (Brief at 30, 35) that, beyond Chambers' own testimony, there is no evidence in the record from which this Court could conclude that "people" have the impression that the state is endorsing a particular religion by retaining Petitioner Palmer for many years. They do not explain, nor could they, why Chambers' testimony [J.A. 29-30] is insufficient to show that "some" people, Larkin v. Grendel's Den, Inc., supra, had this impression.

More to the point, no such proof is necessary. None was offered (or thought

necessary by the Court) in Larkin v. Grendel's Den, Inc., supra. None was offered, or thought necessary, in Stone v. Graham, supra. The absence of such evidence is not mere oversight. Rather, the evidence is unnecessary because the Establishment Clause is aimed at governmental practices which give the appearance of a fusion of government and religion. It is the potential for fusion which is determinative, Lemon v. Kurtzman, supra, 403 U.S. at 619. The Establishment Clause, in other words, is

a prophylactic rule of law.*

To be sure, this Court has held that government may indirectly lend support to religious beliefs without offending the Establishment Clause. Thus, it may refuse to fund most abortions even though that policy may be, and indeed is, viewed as throwing the weight of government behind those religious beliefs which oppose the free availability of abortions. Harris v, McRae, 448 U. S. 297, 319-20 (1980). See also Gillette v.

* This is not to say that any remote possibility that government will be seen as endorsing religion is sufficient to state a claim under the Establishment Clause. At some point, the risk becomes so remote that the Constitution is not violated. The discrimination in favor of one sect here is so blatant, however, that even if there is a de minimis rule applicable, to Establishment Clause cases, see Stone v. Graham, supra, 449 U.S. at 42-3, this is not a case in which it may properly be invoked.

U. S., 401 U.S. 437 (1971); Reynolds v. U. S., 98 U.S. 145 (1878).

In each of these cases government acts for purely secular reasons. The theological impact of a facially secular practice is incidental.* In this case, the challenged action was both on its face religious, and lacking in any secular justification. Indeed, the preference for one faith expressed by Nebraska is an "important indication" that the practice lacks a secular effect. Widmar v. Vincent, 454 U.S. 263, 274 (1981).

Necessarily, a rule that some actions of government are unconstitutional because they symbolically cast the

* See Judge Pettine's discussion of a related issue in Donnelly v. Lynch, supra, 525 F. Supp. at 1165-68.

weight of government behind one sect will require the judiciary to make judgment calls. Lines will have to be drawn between arguably similar practices. The Eighth Circuit has engaged in just such a process. In this case, it found that Nebraska had gone too far; in Bogen v. Doty , 598 F.2d 1110 (8th Cir. 1979), it found that a city had only approached impermissible territory, not entered it, by permitting its public meetings to be opened with an invocation by different Christian clergy.

Exercising judgment is what courts are supposed to do. This Court has done so in the parochial school aid cases, compare Wolman v. Walter, supra, with PEARL v. Nyquist, supra, and the lower courts have done so in judging a variety of government-sponsored activities,

compare Donnelly v. Lynch, supra; ACLU v. Rabun County Chamber of Commerce, supra; Gilfillian v. City of Philadelphia, 637 F.2d. 924 (3rd Cir. 1981); Allen v. Morton, supra. One need not agree with every exercise of judgment in these cases in order to acknowledge that the Establishment Clause calls upon the courts to exercise that judgment.

Implicit in this Court's repeated warnings that the tripartite test is not to be mechanically applied is a mandate to the courts to exercise judgment, Tilton v. Richardson, 403 U.S. 672, 678 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Larkin v. Grendel's Den, Inc., supra.

> [W]e need [not] trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized ... and between the variations ... that I suppose to exist and the simple universality of

> the rules of the Twelve Tables ... there lies the culture of two thousand years.

LeRoy Fibre Co. v. Chicago, M & St. P. Ry Co., 232 U.S. 340, 354 (1914) (Holmes, J., concurring). In the unique factual circumstances of this case, it is certain that Nebraska has gone too far.

III. The Impact of Nebraska's Preference For One Religion Over All Others Is Substantial

This Court has taught that a governmental practice which only incidentally advances religion* is not prohibited by the Establishment Clause, e.g., PEARL v. Nyquist, supra. This does not mean, of course, that a practice

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* The state, (Brief at 29) but not the United States as amicus, urges that the prayer exercises are not religious, and are therefore permissible. The state's position is plainly untenable, particularly given Reverend Palmer's testimony that the prayers were religious. [J.A. 56-59]

which directly advances religion, even though it may have only a slight impact on society generally, is not proscribed by the Establishment Clause.

So long as the benefit to a church directly and immediately assists it to propagate its faith, it matters not that, for the church to capitalize on a governmentally conferred benefit, it must make substantial efforts of its own. The assistance to religion conferred by posting the Ten Commandments on the walls of public school classrooms was surely by itself not sufficient to send students scurrying to churches or synagogues. Nevertheless, because such posting was a measurable step toward the institutionalization of state support for religion, it was impermissible. Stone v. Graham, supra.

Here, the benefit to a particular church is direct and immediate. That sect -- whether it is a particular Christian denomination, the Christian church generally, the Judeo-Christian tradition or the "civil religion" -- bears the imprimatur of the legislature as the sect seen fit to minister to its needs; the prayers offered on its behalf are deemed worthy of reproduction and study by members of the public. There is a message in all of this for the citizens of Nebraska. The message is not conveyed explicitly in words, but it is nonetheless real. See W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (acknowledging that religious symbolism is an effective way of communicating ideas).

IV. Even If A Legislature May Open Its Sessions With Prayer, It May Not Prefer One Religion Over All Others

Petitioners suggest in their brief that this case turns on the constitutionality of beginning the legislative day with a prayer. (Brief at 21) They contend that, if the legislature may open with a prayer, it may hire a chaplain, even of one faith, for an extended period of time, and may publish prayerbooks containing only his prayers. There are several difficulties with this argument. First, the constitutionality vel non of legislative prayers was not presented by the petition for certiorari and thus is not before this Court.

Second, the petitioners' "ends justify the means" argument simply does not hold, for as this Court most recently held in Larkin v. Grendel's Den, Inc.,

supra, even where government has a secular purpose, it may use "religious means" only if no secular means are available.

This is hardly a novel proposition. In McGowan v. Maryland, 366 U.S. 420, 449-50 (1961), a case which petitioners believe is dispositive of this one (Brief at, e.g., 24), this Court, after concluding that the contemporary purpose of the Sunday Blue Laws was primarily secular, held that this finding was not alone dispositive of the case. Rather, a further inquiry was necessary to ascertain that the state could not achieve its purposes other than by a practice which had sectarian overtones.

The state insists in this case that it opens the legislative session with a prayer in order to bring the legislature

to order. It is doubtful that this is a sufficient secular purpose to justify the use of a religious practice such as prayer since order could be achieved without use of prayer -- by gavelling the body to order, for instance.

But even if it be granted that the prayer itself is constitutional, it does not follow that the state's interest can only be fulfilled by having a paid chaplain of one faith on the payroll for over fifteen years (and, if petitioners have their way, indefinitely) and by printing his prayers for public distribution. At least 33 states manage to begin the legislative day with a prayer without paid chaplains. (Brief Amicus of the United States at 6.)

Third, petitioners' argument would permit the legislature to restrict, by

statute, the chaplains to clergy of one denomination. Surely, even they must concede that a holding that they can open the session with a prayer would not justify that form of discrimination. Voswinkel v. City of Charlotte, 495 F.Supp. 588 (W.D.N.C. 1980) (city may not contract with Baptist Church for provision of sole police department chaplain). See also Torcaso v. Watkins, supra.

The fallacy in petitioners' argument is that it overlooks the fact that the Establishment Clause was designed in part to prohibit the state from enlisting religion for the state's purposes. The Establishment Clause, itself forecloses "the ends (legislative prayer) justify the (discriminatory) means" argument of petitioners.

V. The Historical Record Is Not Dispositive of this Case

Petitioners, and the United States as amicus, argue that, because the practice of legislative prayers, and of hiring a legislative chaplain, date to the First Congress which drafted and approved the First Amendment, it cannot be that these practices are unconstitutional. The state petitioners insist the long history of these prayers demonstrate that they are secular; the United States insists that, while religious, they are permissible under the Establishment Clause.

Even early on there were those who objected to paid chaplains and prayers on the ground that the practice was inconsistent with the principle of non-establishment enjoined by the

Constitution. [Brief of the United States at 9, 12.] And as the United States conceded in its brief, [Brief at 12-13] the issue arose again on several occasions during the nineteenth century. The practice thus does not have the unquestioned history of acceptance found persuasive in Walz v. Tax Comm'n, supra.

Nor in any event is history as conclusive of this case as petitioners, and the United States, contend. The First Congress was careful to require that there be two chaplains, of two different faiths, to serve the two houses of Congress on an alternating basis. The United States concedes [Amicus Brief at 25] that this practice was designed to forestall the possibility that a permanent chaplain, serving for an extended period of time, would be seen by

the public as symbolically establishing a particular religion.

Petitioners cite Walz v. Tax Comm'n, supra, as holding that practices which have been validated by history do not violate the Establishment Clause. To be sure, Walz holds that, in interpreting the Establishment Clause, history plays a significant role, although in Walz the Court was careful to limit its use of history to those situations where "none was favored over others, and none suffered interference." 397 U.S. at

677.* Walz is also a substantially more

* Michael Malbin, in Religion and Politics: The Intentions of the Authors of the First Amendment (1981) is generally critical of this Court's treatment of the history of the First Amendment, particularly as it has allowed the Court to conclude that aid to religion generally was proscribed. However, Malbin acknowledges that preferences to one religion are, and were intended to be, prohibited, and thus that forms of aid to religion permissible at the time the Constitution was written are now forbidden because the United States is now a "modern, pluralistic nation, with [a] vast multiplicity of sects" (Id at ii).

It is also worth noting that an early authority on the Constitution excluded Moslems, Jews, or infidels from the protection of the Establishment Clause: (Story, Commentaries on the Constitution of the U. S. § 1871 (1833)).

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.

complex case than petitioners care to admit.

The petitioner in Walz challenged the grant of an exemption for property used solely for religious purposes but not exemptions for property held by religious institutions used for charitable purposes. This Court relied heavily on the practical difficulty which would attend any effort to implement this distinction and the Establishment Clause problems this would entail. 397 U.S. at 674-75. No such problems of administration exist here.

Moreover, because taxation carries with it the power to destroy, McCulloch v. Md., 17 U.S. (4 Wheat) 316, 431 (1819) grants of exemption "historically

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The amicus takes it that neither petitioners or the United States believe this history to be controlling.

reflect the concerns ... as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers," 397 U.S. at 673. Prayers in the legislatures, and certainly the hiring of chaplains for indefinite periods of time, have no such socially redeeming virtues.

It may be that legislative prayers, or indeed, the existence of a chaplaincy, have been "grandfathered," see, Walz v. Tax Comm'n, supra; Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), although, as the Fourth Circuit held in Hall, the "grandfather" principle ought to be reserved for those routinized forms, such as "God save this Honorable Court," which have lost all theological significance. [See, J.A. 32; 36-37] In this case,

Reverend Palmer's prayers are not routinized; on the contrary, they are prepared with an eye towards the events of the day [J.A. 43] Or perhaps such prayers are merely ceremonial notations of the fact "that we are a religious people whose institutions presuppose a Supreme Being," Zorach v. Clausen, 343 U.S. 306, 313 (1952), which are to be tolerated, despite the fact that constitutional violations do not ripen into vested rights, Walz v. Tax Comm'n, supra, 397 U.S. at 678, and even though traditional Establishment Clause analysis leads inexorably to the conclusion that such practices are unconstitutional.*

* The state places heavy reliance on cases holding that public meetings may be opened with prayers. But as already noted that is not the issue in this case. At least two of those cases, Bogen v. Doty, supra, and Marsa v. Wernik, 86 N.J.

232, 253-54, 430 A.2d 888, 899-900 (1981) specifically note that their approval was conditioned on the exercises either not favoring one sect (Bogen) or being non-denominational (Marsa). Both of these cases, as well as Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968), involve unpaid, rotating clergymen of various sects.

Only Colo v. Treasurer, 378 Mass. 550, 392 N.E. 2d 1195 (1979) upholds both a paid chaplaincy and de facto religious discrimination. This latter holding seems based only on the Equal Protection Clause and a record, unlike the present one, containing no indication that clergymen of some sects would not be considered for the position.

Petitioners also rely on a series of decisions permitting the recitation of prayers during public school graduation and baccalaureate services. Those cases are simply inconsistent with Engel v. Vitale, supra, and Treen v. Karen B., 102 S.Ct. 1267 (1982), and merit no deference. Indeed, one state court has held that public schools may not begin the school day by reading the daily prayer offered at the opening of the Congress. State Bd of Educ. v. Bd of Educ., 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970).

Finally, petitioners rely on dicta of several Justices of this Court indicating that legislative prayers are constitutional, most particularly the suggestion

But this Court need not decide in this case whether it would invoke any of these principles in regard to the custom of opening public meetings with a prayer. Rather, what is at issue here is the very different question of whether, even assuming that such prayers may be offered, a state may do so in a way that favors a particular sect. This Court long ago settled that question.

In Niemotko v. Maryland, 340 U.S. 268 (1951) this Court reversed a conviction for disturbing the peace on the ground that the record showed that Jehovah's Witnesses were singled out for

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to this effect in Zorach v. Clausen, supra, 343 U.S. at 312. Justice Douglas, author of that opinion, subsequently repudiated this view in Engel v. Vitale, supra. In any event, nothing in those dicta suggests that a program of legislative prayer may be operated so as to favor one sect.

prosecution, while other religious groups held similar meetings in the same public park without interference. Under these circumstances, the Court refused to consider the state's argument that all religious practices could be excluded from the public parks, for even if a state could do so, it could not exercise that power in discriminatory fashion. Accord, Fowler v. Rhode Island, 345 U.S. 67 (1953).

Niemotko held only that a state may not intentionally discriminate against unpopular sects; subsequent decisions have held that the state must justify even "a facially neutral religious gerrymander" by demonstrating the presence of a "neutral, secular basis for the lines government has drawn." Gillette v. United States, supra, 401

U.S. at 452. Larson v. Valente, supra, 102 S. Ct. at 1684, n. 23, however, requires a showing of a compelling interest where a state explicitly discriminates between sects.

Here the legislature, by appointing a chaplain of one sect for many years, distinguished, along religious lines, between one church and all others. This is not a case in which a facially secular practice has a disparate impact on different sects. Rather, it is an intentional religious distinction which the state has not justified by any secular purpose, let alone by a

compelling one.*

At a minimum, the state would have to show that it had no alternatives to the appointment of one chaplain every two years, for example, or the use of lay volunteers, or rotating chaplains, practices followed in numerous other

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* Although the statute in Larson was not cast explicitly in terms of a favored sect, the inevitable result of the line drawn there was to distinguish between established and newer churches. Accordingly, this Court characterized the distinction as tantamount to an explicit one between well-established churches and less established churches.

The United States government contends (Brief Amicus at 22, n.15) that the rule of Larson applies only to statutes which discriminate between religions. Niemotko, Fowler, and Yick Wo. v. Hopkins, 118 U.S. 356 (1886) all stand for the proposition that there is no distinction between discriminatory statutes and discriminatory enforcement.

states.* And even if the result would be that, on occasion, no prayer was offered, the state would be required to show that there was no other substitute for prayer to set the tone for the day's deliberations.

VI. Payment of the Chaplain's Salary, and the Printing, at State Expense, of the Prayerbooks Are Unconstitutional

This Court's decisions have emphasized that the Establishment Clause was aimed in particular at compelled financial support for churches and ministers. Justice Black put the matter boldly in Everson v. Bd of Educ., supra, 330 U.S. at 16:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions

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* The petitioners argue that any such alternative would necessarily be far more entangling and divisive than the current system, thus attempting to draw a parallel between this case and Walz v. Tax Comm'n, supra. There is simply no evidence from other states in support of this claim, nor does the practice of the localities where such is the practice, see note to p. 34, supra.

> whatever they may be called, or whatever form they may adopt, to teach or practice religion.

See also Walz v. Tax Comm'n, supra, 397 U.S. at 668 (1970).

This insistence is not surprising, given the roots of the Establishment Clause in the struggle over Virginia's attempt to tax its citizens to pay for the upkeep of the established church. This Court has recited that history on several occasions. It would serve no useful purpose to restate it here. Independent, then, of any questions of a religious preference, Nebraska's practices are unconstitutional.

It cannot be seriously contended, petitioners' arguments notwithstanding, that Reverend Palmer's invocations are not religious. He conceded as much, [J.A. 56-59], although he appeared to believe that the prayers did not advance

religion because they did not seek to make converts to any particular faith. [J.A. 61] Nor can there be any doubt that the payment of a chaplain's salary, particularly where that officer's duties are limited to the recitation of an invocation at the beginning of each legislative day,* is payment for the performance of religious duties.

The petitioners argue that, if the legislature may open the day with a prayer, it may pay for a permanent chaplain to recite that prayer. The superficial appeal of this argument does not withstand analysis, for it ignores

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* Different, and more difficult, issues would be presented if the chaplain performed other duties, such as counselling, and the persons counselled would likely confide only in a clergyman who was a member of the same institution, particularly one such as a police department, organized along military lines.

the special significance the Founders placed on not taxing citizens to pay for the performance of religious duties. That the state, for example, must permit college students to use facilities for religious services, Widmar v. Vincent, supra, does not mean that it can pay for the construction of chapel facilities. Tilton v. Richardson, supra. See also Voswinkle v. City of Charlotte, supra.

Petitioners contend, citing McDaniel v. Paty, 435 U.S. 618 (1978), and Bradfield v. Roberts, 175 U.S. 291 (1899), that there is no prohibition of paying religious orders or clergy for services rendered, and that such a prohibition would interfere with the Free Exercise of religion. While both of these claims are correct statements of

the law, neither McDaniel nor Bradfield is relevant here. In both, the state paid a religious person (or order) for providing it with secular services.* Here, however, the state is impermissibly paying for the provision of religious services in a secular setting, Hunt v. McNair, 413 U.S. 734, 743 (1973).

Moreover, over and above the special status accorded the prohibition on spending funds to aid religion, there is yet another reason why the payments here are impermissible -- because there is no showing that it would be impossible to have a daily prayer without a paid

* Accord, Thomas v. Schmidt, 397 F. Supp. 203 (D.N.H. 1975), aff'd, 539 F.2d 701 (1st Cir. 1976); School District of Hartington v. Nebraska State Bd. of Educ., 188 Neb 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972) (both involving leases of church property).

chaplain. Petitioner attempted to show that without payment, clergy would not accept the task of offering a daily prayer. But even if this is so, and the experience of 33 states belies it, there is surely no rule of law which requires that prayers be offered by members of the clergy.

An affirmance here would not invalidate paid chaplaincies in prisons, hospitals, or the military. Those chaplaincies have little in common with the one at issue in this case, beyond a common name. As Justice Brennan observed in School District of Abington Twshp v. Schempp, supra, 374 U.S. at 296-8:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for

> churches and chaplains at military establishments [and in prisons] for those in the armed services [and in prisons] may afford ... such example[s].
>
> * * *
>
> [S]uch provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause.

Accord Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976). Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973) ("so long as no particular religion is fostered"); Horn v. People, 321 F. Supp. 961, 964 (E.D. Cal. 1968).*

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* Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972), holds that, even in the context of prison chaplains, the state may not arbitrarily discriminate against members of some faith in the hiring of chaplains.

Members of the legislature are not deprived of their freedom. No Free Exercise claim can therefore be made to sustain the appointment of a chaplain to legislative officials. The appointment of a paid chaplain must therefore be "assumed to contravene the Establishment Clause."

Conclusion

For the reasons stated, the judgment should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, STATE TREASURER, et al.,
Petitioners,

—v.—

ERNEST CHAMBERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI BRITH IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI BRITH IN SUPPORT OF RESPONDENT

Amicus supports the position of respondent and respectfully submits that the judgment of the United States Court of Appeals for the Eighth Circuit in the above-captioned case should be affirmed.[1]

Interest of the *Amicus Curiae*

The Anti-Defamation League of B'nai Brith was organized in 1913 as a section of B'nai Brith, the oldest civic service

1 *Amicus* has filed with the Clerk of the Court letters, from counsel for all parties, consenting to the filing of this brief.

organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs before this Court in such cases as *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), *Sherbert v. Verner*, 374 U.S. 399 (1963), *Board of Education v. Allen*, 392 U.S. 236 (1968), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lemon v. Sloan*, 413 U.S. 825 (1973), *Meek v. Pittenger*, 421 U.S. 349 (1975), *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), and *Wolman v. Walter*, 433 U.S. 229 (1977). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

In this case, the Court is asked to decide whether the chaplaincy practice of the Nebraska Unicameral Legislature violates the Establishment Clause of the First Amendment. *Amicus* believes that Nebraska's retention of a chaplain of one denomination for an extended period of time, and its expenditure of funds during that time to support the daily recitation of prayers, grant a denominational preference and constitute the type of governmental support for religion prohibited by the Establishment Clause. Accordingly, *amicus* urges the Court to affirm the Eighth Circuit's holding that Nebraska may not continue its present chaplaincy practice.

Statement of the Case

At the beginning of each session of Nebraska's Unicameral Legislature, the Executive Board of the Legislative Council of the Legislature recommends the selection of a chaplain. *Chambers v. Marsh*, 504 F. Supp. 585, 586 (D. Neb. 1980). Expressly authorized by statute until 1973, the procedure has since taken place pursuant to internal leglislative rules promulgated under a statute authorizing the selection of legislative officers. *Rules of the Nebraska Unicameral Legislature*, Rule 1, Section 2 ("Nebraska Rules"); *Nebraska Revised Statutes* § 50-111 (1978). The procedure has resulted in the selection of Robert Palmer, a Presbyterian clergyman, as the Legislature's sole chaplain since 1965. 504 F. Supp. at 586.

Mr. Palmer's duties, set by the Nebraska Rules, include opening every session of the Legislature with a prayer. Nebraska Rules, Rule 7(a), Section 1(b). The Legislature compensates the chaplain for his services out of public funds pursuant to statutory authorization. *Nebraska Revised Statutes* § 50-112 (1978). Compensation is paid at the rate of $320 per month for every month the Legislature is in session. *Chambers v. Marsh*, 675 F.2d 228, 230 (8th Cir. 1982).

On three occasions during Mr. Palmer's 16-year tenure, prayer books containing compilations of his opening prayers have been published and made available for public distribution. Financing for this also came from state funds, the expenditure of which was approved by vote of the Legislature. 504 F. Supp. at 586.

A sampling of Mr. Palmer's published opening prayers, which is included in the record before this Court, reveals that the prayers which Mr. Palmer has used to open the legislative sessions are both religious and denominational.[2] All of them

2 Charles Stephen, Jr., a clergyman who testified at the trial of this case as an expert witness, observed:

> "Roughly half the prayers that I have seen in those booklets . . . had Christian terminology, such as Jesus Christ or Our Lord or terminology such as that. . . ." Joint Appendix, 36 ("J.A.")

contain a theistic message and many contain references to basic tenets of the Christian faith. Indeed, Mr. Palmer himself characterized the prayers as Christian, although in his view they nevertheless remained non-sectarian since most Americans are Christian.[3]

The prayer practice is an integral part of the Nebraska Legislature's daily routine whenever it is in session. The Rules mandate that the chaplain "shall open with prayer each day's sitting of the Legislature." Nebraska Rules, Rule 1A, Section 21. And the prayer is part of the official proceedings; under the Rules, the chaplain's prayer is the first item in the "order of business." Nebraska Rules, Rule 7(a), Section 1(b).

This case presents a challenge to this particular chaplaincy practice—involving the retention of a chaplain of one denomination for an extended length of time and payment of state funds to compensate the chaplain for reciting prayers which are religious and emphasize the precepts of one denomination. This case does not involve a challenge to legislative chaplaincy practices in general.

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3 At his deposition, Mr. Palmer testified as follows about prayers he had offered in the Legislature:

> "Q. The last sentence, what does the last sentence say? A. In the name of Christ Our Lord.
>
> Q. You'd agree, I assume, that— A. It's a Christian—
>
> Q. Narrows it down to a Christian prayer? A. I wouldn't say sectarian, but I'd say Christian." (J.A. 76)
>
> • • •
>
> "Q. The flavor. Would you say that they're Christian prayers, at least in the sense that you use the word 'Jesus' and 'Christ'? Would that be fair to say? A. No, that wouldn't be fair to say at all . . . The majority of the prayers reflect more of what I don't like to use as a phrase, but I will, to clarify things, just civil religion in America. The kind of religious expressions that are common to the vast majority of most all Americans. (J.A. 83)

Summary of Argument

The Nebraska Legislature's chaplaincy practice grants a denominational preference and involves governmental financial support of religious activity. These two factors void the chaplaincy practice under the principles developed by this Court.

The chaplaincy practice here involves religious activity—the daily recitation of prayers which are religious in nature and the periodic publication of those prayers. By appointing a chaplain of one denomination to perform this religious activity for 16 straight years, Nebraska's Legislature has effectively granted a denominational preference. Under the Court's recent ruling in *Larson v. Valente*, 102 S. Ct. 1673 (1982), such a preference calls for strict scrutiny of the challenged practice. Nebraska's chaplaincy practice cannot withstand that analysis.

Nebraska's chaplaincy practice also cannot survive under the traditional three tests enumerated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Compensating the chaplain for offering prayers which are both religious and denominational has the direct effect of advancing religion in general and his religion in particular. In addition, church and state in Nebraska have become excessively entangled by virtue of the close and long-standing relationship between the Legislature and its chaplain and the potential that exists for political divisiveness.

Nebraska's chaplaincy practice cannot be upheld on the basis of legislative history which shows that the First Congress of the United States had chaplains, and compensated them, at the time that same Congress approved the language and content of the First Amendment. The First Congress' own nascent chaplaincy practice is the only one which that Congress can be deemed to have approved. That practice cannot be equated with the one challenged here.

ARGUMENT

THE NEBRASKA LEGISLATURE'S CHAPLAINCY PRACTICE VIOLATES THE FIRST AMENDMENT

A state practice cannot be sanctioned if it violates the First Amendment's prohibition against "establishment of religion." *Cantwell v. Connecticut,* 310 U.S. 296 (1940). To come within the ambit of the Establishment Clause, a practice must relate in some way to religion or religious activity.

The three tests articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), have served most often as this Court's tool for analyzing whether a practice which does involve religious activity conflicts with the Establishment Clause.

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz* [*v. State Tax Commission,* 397 U.S. 664, 674 (1970)]. . . ." 403 U.S. at 612-613.

In addition, the Court has given special consideration to certain factors, because their presence serves to "identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger,* 421 U.S. 349, 358-59 (1975). These factors weight analysis heavily toward a finding of unconstitutionality. Thus, in *Larson v. Valente,* 102 S. Ct. 1673 (1982), the Court recently held that the presence of one such factor—that the practice effectively grants a denominational preference—requires that the law involved must be treated as suspect and its constitutionality adjudged under a strict scrutiny standard. Government financial support of religious activity is another factor which arouses heightened concern. Like denominational preference, it touches a central nerve of the Establishment Clause; indeed, the Court has

termed it one of the three dangers the Framers meant to guard against with the Establishment Clause. *Walz v. State Tax Commission*, 397 U.S. 664, 668 (1970).

As we show below, Nebraska's chaplaincy practice does involve religious activity and must accordingly be analyzed for infirmity under the Establishment Clause. And whether considered under the standard developed in *Larson* or that set forth in *Lemon*, the practice's grant of a denominational preference and the use of state funds in support of religious activity makes Nebraska's chaplaincy practice violative of the Establishment Clause.

I.

NEBRASKA'S CHAPLAINCY PRACTICE INVOLVES RELIGIOUS ACTIVITY

The morning prayers recited by Nebraska's chaplain are religious in nature. As the district court found in this case: "To say that the prayers have no religious purpose would reach incredibility; they do indeed have a religious purpose for the chaplain and for those who choose to listen for spiritual reasons." 504 F. Supp. at 589.

It could not be otherwise, given the numerous references to God, Christ and precepts of Christianity. Indeed, the prayers here have far more religious content than the twenty-two word prayer whose recitation in New York schools was struck down in *Engel v. Vitale*, 370 U.S. 421 (1962), of which the Court said: "There can, of course, be no doubt that [it] . . . is a religious activity." *Id.* at 424.

That there is also a secular objective for offering the prayers—"bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner," 504 F. Supp. at 589—does not change its inherently religious character. This Court has repeatedly refused to overlook the religious nature of practices involving the use of religious text, even

where the stated objective of the practice is wholly secular. In *School District of Abington Township, Pennsylvania v. Schempp,* 374 U.S. 203, 224 (1963), for example, the Court rejected the state's argument that the purposes of bible reading exercises were wholly secular, stating: "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid." Similarly, in *Stone v. Graham,* 449 U.S. 39, 41 (1980), the Court rejected arguments that the Ten Commandments were being used in a classroom in a wholly secular way: "The Ten Commandments is undeniably a religious text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *See also Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981), *aff'd without opinion,* 102 S. Ct. 1267 (1982) ("That [prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise").

Given the inherently religious character of the prayers—which the chaplain recites daily in the Legislature when it is in session and which have been published periodically, pursuant to the Legislature's authorization—Nebraska's chaplaincy practice must be subjected to examination to determine whether it "establishes" religion in contravention of the First Amendment.

II.

NEBRASKA'S CHAPLAINCY PRACTICE IS UNCONSTITUTIONAL UNDER THIS COURT'S RULING IN *LARSON V. VALENTE*

A. Nebraska's Chaplaincy Practice Is Subject To Strict Scrutiny Under *Larson*

In *Larson v. Valente,* 102 S. Ct. 1673 (1982), the Court held that strict scrutiny is required of a statute which grants a denominational preference, because prevention of governmental preference of one religion over another is at the very heart of the Establishment Clause. "The clearest command of the

Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 1683.

The challenge in *Larson* was to a statute which exempted religious organizations from registration and disclosure requirements applicable to charitable organizations. The statute contained a "fifty percent rule," providing that the exemption was available only to those religious organizations that received more than half their total contributions from members or affiliated organizations. This, the Court found, "effectively distinguishes" between well-established churches and churches which are either new, lacking in members or favor public solicitation as a matter of policy. *Id.* at 1684 n. 23.

Applying the strict scrutiny test, the Court agreed that the statute did have a valid secular purpose: protecting citizens from abusive practices in solicitation of funds for charitable purposes. *Id.* at 1685. But, it held, even assuming *arguendo* that this could satisfy the requirement of a "compelling" governmental interest, the fifty percent rule was nevertheless constitutionally infirm because it was not "closely fitted" to furthering that interest: there was nothing in the record before the Court showing that the fifty percent rule was necessary to protect citizens from abusive practices, or that it was even logically related to the promotion of that interest. *Id.* at 1685-87.

Nebraska's chaplaincy practice poses the same danger—denominational preference—as the statute struck down in *Larson*. Retaining a chaplain of one denomination to perform a religious function over an extended period of time gives the unmistakable impression that the particular religion is preferred by those doing the choosing—in this case, the Legislature. The practice, accordingly, should be subjected to the same strict scrutiny.[4]

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4 Unlike the situation in *Larson*, denominational preference is not evident on the face of Nebraska's rule or statute. This difference, however, does not alter the need for strict scrutiny here. It is the Legislature's *practice* that is being challenged, not its statute or rule.

[footnote continued]

B. The Chaplaincy Practice Does Not Serve A Compelling Governmental Interest And, In Any Event, Is Not Closely Fitted To Furthering Any Such Interest

Although the chaplaincy practice unquestionably serves a valid secular interest, in addition to a religious purpose, this secular interest—bringing the legislators to order in a solemn and thoughtful manner—cannot fairly be characterized as compelling. It is at most only tangentially related to the real governmental interest implicated here: the legislative function. Bringing the legislators to order is preliminary. The calling-to-order by means of a ceremony is, in fact, probably not necessary at all, for the sound of a gavel can do that. And while the prayer may serve to create a sense of solemnity, ceremony or history, these are only matters of atmosphere. They do not have any significant relationship to the essence of lawmaking—dissemination of information and debate.

Even if the interest served were deemed to be compelling, the practice is not "closely fitted" to it. The religious nature of the invocations is unrelated to the secular objective of calling the legislators to order in a solemn, thoughtful manner. There are numerous invocations without religious overtones which would create an atmosphere of order and solemnity. Similarly, restricting the chaplaincy to a representative of only one religion for an extended length of time has no relationship to this secular objective.

Nor is there the required close fit between the secular objective here and Nebraska's practice of compensating the chaplain with taxpayer funds. There is nothing to suggest that it is the use of taxpayers' funds, rather than funds from some other source, that enables the Legislature to secure chaplain services. In any event, using funds from some other source

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[footnote continued]

That practice violates the "clearest command of the Establishment Clause" no less than the statute in *Larson*. The facial neutrality of Nebraska's statute and rule cannot save the practice, any more than an unconstitutional act of the executive branch can be validated by the soundness of the underlying statute which cloaks it with authority.

would not cure the problem. The state may not provide funds—directly or indirectly—for use in connection with an activity which is religious in character. See discussion at 11-14 *infra.*

Because Nebraska's Legislature, through its chaplaincy practice, has granted a denominational preference, and because that practice neither furthers a compelling governmental interest nor is closely fitted to furthering any valid secular interest, the practice cannot be sanctioned.

III.

NEBRASKA'S CHAPLAINCY PRACTICE IS UNCONSTITUTIONAL UNDER *LEMON V. KURTZMAN*

Even if Nebraska's chaplaincy practice could survive strict scrutiny, it could not pass muster under the standard of *Lemon v. Kurzman, supra.* A practice must satisfy all three of the tests in *Lemon* in order to avoid the prohibition of the Establishment Clause. *Stone v. Graham,* 449 U.S. 39, 40 (1980). Nebraska's chaplaincy practice fails two of those tests. It has the direct effect of advancing religion and it fosters an excessive government entanglement with religion.

A. Nebraska's Practice Has The Direct Effect Of Advancing Religion Because It Involves Governmental Financial Support Of Religious Activity

The Establishment Clause was designed to guard against governmental financial support of religious activity. *Walz v. State Tax Commission,* 397 U.S. 664, 668 (1970). This Court, accordingly, has closely scrutinized schemes that funnel funds to religious institutions or otherwise subsidize or aid religious practices. Indeed, the proscription against providing financial support to religion is so central to the Establishment Clause, the Court has held that the mere possibility that government funds might be used in connection with religious activity is enough to void a practice under that Clause.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down a financial aid program which gave money grants to non-public schools for maintenance and repair because nothing in the statute barred use of the funds to pay salaries of employees who maintained the school chapel, or the cost of renovating, heating or lighting classrooms in which religion was taught. *Id.* at 774. To pass muster, the Court said, there must be "an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and nonideological purposes." *Id.* at 780. *See also Tilton v. Richardson*, 403 U.S. 672 (1971) (voiding that part of a statute which entitled the government to recover construction grants to sectarian colleges if the money was used to promote religious interests, but which provided for expiration of that condition after twenty years).

The Court has upheld state aid only where it is for use solely in connection with a wholly secular function. In such instances, the mere fact that aid goes to a religious institution does not invalidate the practice, since the aid to the institution is only incidental to the provision of support for the secular activity. *See Everson v. Board of Education*, 330 U.S. 1 (1947) (reimbursement for public transportation); *Board of Education v. Allen*, 392 U.S. 236 (1968) (provision of secular textbooks). But supported activities must be " 'so separate and so indisputably marked off from the religious function,' . . . that they may be fairly viewed as reflections of a neutral posture toward [religion]. . . ." *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 782, *quoting Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

Nebraska's chaplaincy practice does not fit within that limited category of practices which are "so separate and indisputably marked off from the religious function," and it does not provide the necessary "guarantee" that state funds will be used only for secular functions. The prayer practice serves both religious and secular functions. The functions are intertwined and cannot be separated from each other. Expenditure of state funds in connection with the practice thus inevi-

tably involves financial support of religious activity. That invalidates the practice. Expenditures for the purpose of publishing the prayers are impermissible for the same reasons.

It makes no difference that the payments go to the chaplain individually, rather than to his church. It is not the identity of the recipient that matters; it is the nature of the activity for which the state is providing support. If the activity is religious in nature—even if it also has aspects which are secular—the government cannot support it financially. The Court made this clear in *Nyquist*, invalidating a tuition reimbursement program which provided payments directly to low income parents who sent their children to non-public schools.

The presence of both secular and religious components in Nebraska's chaplaincy practice distinguishes this case from *McGowan v. Maryland*, 366 U.S. 420 (1961), where the Court rejected a challenge to Sunday Closing Laws. The holding there rested on the Court's finding that the Closing Laws had shed their religious character over time. Tracing the development of Sunday legislation over the years, the Court concluded that the Laws had "undergone extensive changes from its earliest forms, *id.* at 431; that over time Sunday had been transformed into a day of "recreation, cheerfulness, repose and enjoyment," *id.* at 448; and that legislation prohibiting certain activities on Sunday could no longer be characterized as religious in character, as evidenced by exemptions given to various activities, such as sale of alcoholic beverages and operation of beaches and amusement parks, *id.* On the basis of these findings, the Court held that any benefit to religion, such as facilitating church attendance, was incidental and not sufficient to invalidate the laws as "respecting an establishment of religion."

Unlike the Sunday closing practice at issue in *McGowan*, the purpose and character of Nebraska's chaplaincy practice remain religious to this day. And because Nebraska's chaplaincy practice involves religious activity, under the principles established by this Court in *Nyquist* and the other financial

support cases, the use of state funds in connection with that activity has the proscribed effect of advancing religion, both directly and immediately.

B. Nebraska's Chaplaincy Practice Has The Prohibited Effect Of Advancing Religion Both In The Legislature And In Society As A Whole

It is *amicus'* contention that Nebraska's chaplaincy practice has the prohibited effect of advancing religion even though the prayers are directed at the legislative membership, not at the public at large, and even though the members of the Legislature are apparently free to absent themselves during the morning prayer.

There is no state function more public than the making of laws. The sessions of the Legislature, at which this function takes place, are the subject of the attention of a broad spectrum of the citizenry, from politically minded adults to impressionable school children who study it in civics. The chaplaincy practice is part and parcel of those legislative sessions. Regardless of whom the chaplaincy practice was intended to benefit, its effects carry beyond the legislative chamber; indeed it is difficult to imagine a forum that would serve more effectively to convey a message to all Nebraskans.

Since the effects of the chaplaincy practice are not confined to the Legislature, the legislators' freedom to walk out during the prayer ceremony is of no significance. In any event, the Court has consistently held that the Establishment Clause cannot be circumvented by making a practice voluntary:

> "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause. . . ."

Engel v. Vitale, 370 U.S. 421, 430 (1962). *See also School District of Abington Township, Pennsylvania v. Schempp, supra*, 374 U.S. at 224-25.

Nor does it matter that, apart from the challenge respondent has mounted in this case, there has apparently been little concern voiced by either the Legislature or citizens over Nebraska's chaplaincy practice. It is enough that respondent objects. Whether a practice is or is not constitutional has no relationship to the number of people who agree with it. *School District of Abington Township, Pennsylvania v. Schempp, supra*, 374 U.S. at 226. In fact, the very purpose of the Bill of Rights was to take certain matters away from "the vicissitudes of political controversy." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). "One's rights to . . . freedom of worship . . . may not be submitted to vote; they depend on the outcome of no elections." *Id.*

The Court has always shown great sensitivity to practices that threaten to impinge on the First Amendment. Even a minor encroachment is enough to warrant invalidating a practice. As the Court said in *Schempp*:

> "[I]t is no defense to urge that the religious practice here may be a relatively minor encroachment on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent. . . ." 374 U.S. at 225.

Nebraska's chaplaincy practice has an effect that advances religion. It is not necessary to determine the extent to which religion is advanced. The fact that there is an effect, and that it is direct and immediate, makes it inconsistent with the First Amendment.

C. Nebraska's Practice Fosters An Excessive Entanglement With Religion

The "entanglement" component of the *Lemon* tests guards against "the intrusion of either [church or state] into the precincts of the other," *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), and the potential for political divisiveness along religious lines, *Committee for Public Education v. Nyquist, supra.*

The same aspects of Nebraska's chaplaincy practice which trigger strict scrutiny under *Larson* and directly advance religion also give rise to an excessive entanglement of church and state. The extended tenure of the chaplain and the use of state funds to pay his salary and publish his prayers result in so close a relationship between the chaplain and the Legislature that they have "invaded each other's precincts."

Additionally, the chaplaincy practice here has the potential for political divisiveness. The respondent in this case testified at trial that the prayer practice, and his response to it, create political divisiveness between him and the other legislators. (J.A., 24-25) And the longer the legislature's employment of a chaplain of one denomination goes on—foreclosing the chaplaincy from others—the greater the likelihood that legislators and their constituents with a different religious orientation will balk at the seeming preference of another religion and press to have someone of their own religion occupy the post.

In short, Nebraska's chaplaincy practice cannot survive the "effect" or "entanglement" tests of *Lemon*. As reflected in the application of those tests, Nebraska's practice entails a relationship between religion and the Legislature which does not comport with the constitutional principle of separation of church and state.

IV.

NEITHER THE LEGISLATIVE HISTORY OF THE FIRST AMENDMENT NOR HISTORICAL ACCEPTANCE OF CHAPLAINCIES SAVES NEBRASKA'S CHAPLAINCY PRACTICE FROM UNCONSTITUTIONALITY

Petitioners, and the United States in its amicus brief, point out that members of the First Congress appointed and voted to compensate chaplains about the time that the First Amendment was ratified. On the basis of this legislative history, they argue that the Framers did not mean to disallow chaplaincies and Nebraska's present chaplaincy practice must therefore be held constitutional.

The argument proves too much. The existence of paid Congressional chaplaincies at the time the language of the First Amendment was accepted shows only that chaplaincies were not viewed as necessarily inconsistent with the First Amendment. But it does not follow, and there is nothing in the legislative history to suggest, that the First Congress gave, or intended to give, blanket and prospective approval to any and all chaplaincy practices.

The chaplaincy practice challenged in this case is different than the practice in Congress at the time it approved the content of the First Amendment. The practice at issue here involves a Legislature with but one House and the retention and compensation of a chaplain of one denomination for 16 consecutive years. These factors were not present in the chaplaincy practice the First Congress had. At the time Congress reached final agreement on the wording and content of the Bill of Rights, the Senate and House chaplaincies had been in effect only five months; and legislation to compensate the chaplains was only three days old. Brief for the United States as Amicus Curiae, at 11. Furthermore, the practice approved by Congress specifically provided for the hiring of two chaplains—one in each House, to be interchanged weekly—each of different faith. Brief for the United States as Amicus Curiae, at 10-11.[5] The use of two chaplains, and the practice of rotating them between Houses, is, of course, not even possible in Nebraska, which has only one House.

In light of these differences, it cannot reasonably be concluded that the implicit approval the First Congress gave to its own practice extends to the Nebraska practice at issue here.

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5 The United States points out that this rotation practice was discontinued in 1856, although as it happens, both Houses have always had chaplains of different denominations. Brief for the United States as Amicus Curiae, at 13. The fact that the rotation practice was discontinued is not relevant to the intent of the First Congress, which approved the language of the First Amendment some seventy years earlier.

Nor does the use of legislative chaplaincies over the years by Congress and the States serve to validate the chaplaincy practice challenged here. The mere fact of long use cannot validate an otherwise unconstitutional practice.

> "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. State Tax Commission, supra,* 397 U.S. at 678.

Although the Court did review the history of challenged practices in both *Walz* and *McGowan v. Maryland, supra,* these historical overviews were provided because they illuminated aspects of the practices which negated any finding of unconstitutional effect. In *Walz,* the Court looked at history in explaining that tax exemptions for religious institutions were a response to earlier use of the tax to oppress religion as well as the product of a desire to minimize government involvement in religious affairs. 397 U.S. at 675. And in *McGowan v. Maryland, supra,* the passage of time was significant because during it, the practice of Sunday closing had shed its religious character.

Unlike the tax exemption upheld in *Walz,* Nebraska's chaplaincy practice does not derive from considerations underlying the Establishment Clause or any other constitutional source. And in contrast to the Sunday Closing Laws, Nebraska's chaplaincy has not shed its religious character.

The appropriate method for resolving the constitutionality of Nebraska's practice is by applying the principles the Court has developed in the context of Establishment Clause adjudication. Applying those principles here compels the conclusion that Nebraska's chaplaincy practice is unconstitutional.

Conclusion

"In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School District of Abington Township, Pennsylvania v. Schempp, supra,* 314 U.S. at 203. Through its chaplaincy practice, the State of Nebraska has deviated from that position by granting a denominational preference and using state funds to advance religion.

Amicus urges the Court to restore the constitutionally mandated neutrality by voiding Nebraska's chaplaincy practice.

Respectfully submitted,

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IN THE

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ERNEST CHAMBERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR JON GARTH MURRAY, MADALYN MURRAY O'HAIR, AND THE SOCIETY OF SEPARATIONISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE *

Jon Garth Murray and Madalyn Murray O'Hair are two individual atheists and federal taxpayers. They are also officers of the Society of Separationists, a non-profit organization of atheists most of whose members are federal taxpayers. One of the purposes of the organization is to safeguard the civil liberties of atheists. Mr. Murray, Ms. O'Hair, and the Society of Separationists, either separately or together, have in fact been parties to, or have participated as amici in, a number of lawsuits which have

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* This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.

raised questions concerning the proper interpretation of the First Amendment to the United States Constitution.

More specifically, in June of 1980 the amici filed a complaint in federal district court challenging the constitutionality of using taxpayer funds to compensate the chaplains of the United States House and Senate. That lawsuit is now pending before the United States Court of Appeals for the District of Columbia Circuit, awaiting a determination by that court of whether the amici have standing and whether the lawsuit presents a nonjusticiable political question. *Murray v. Buchanan*, No. 81-1301 (reheard en banc October 27, 1982). Because the Nebraska Legislature also uses taxpayer funds to compensate its chaplain, the Court's decision in the instant case may provide substantial insight into the constitutionality of compensating the chaplains of the House and the Senate out of public funds.

SUMMARY OF ARGUMENT

A publicly-funded legislative chaplaincy is, as James Madison recognized, a palpable violation of the Establishment Clause of the First Amendment. One of the specific practices the Establishment Clause was designed to prevent was "[t]he imposition of taxes to pay ministers' salaries." *Everson v. Board of Education*, 330 U.S. 1, 11 (1947).

That the First Congress had publicly-funded legislative chaplains is not dispositive of the constitutionality of the practice. In *Brown v. Board of Education*, 347 U.S. 483 (1947), this Court specifically rejected the argument that a practice cannot be said to violate a constitutional amendment if the Congress that proposed the amendment, and most of the states that ratified it, permitted or required the practice. Just as the changing emphasis on public education led this Court in *Brown* to conclude that the historical evidence it was presented with was at best

"inconclusive", *id.* at 489, so too the "profound changes" in our country's "religious composition" that have taken place since the time of the First Congress, *see Abington School District v. Schempp*, 374 U.S. 203, 240-41 (1963) (Brennan, J. concurring), indicate that a publicly-funded legislative chaplaincy is today, because of our nation's religious diversity, inconsistent with the very values the First Congress enshrined in the First Amendment. "[P]ractices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the non-believers alike." *Id.*

A publicly-funded legislative chaplaincy fails to meet any of the criteria it needs to satisfy to pass muster under the Establishment Clause. *See Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4027 (1982); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). No extended analysis is required to establish this point. It is sufficient to look at the practice in the United States Congress. There on a routine basis the chaplains utilize their tax-supported pulpits to lecture our nation's legislators on the immorality of those whose religious viewpoints differ from theirs. *See, e.g.*, 128 Cong. Rec. S4115 (daily ed. April 28, 1982) (criticism of those who believe in evolution). To hold that the tax dollars of religious dissenters can be used to fund prayers in our nation's legislatures which deride the beliefs of those dissenters would make a mockery of the First Amendment.

ARGUMENT

THE NEBRASKA LEGISLATURE'S USE OF TAXPAYER FUNDS TO COMPENSATE ITS CHAPLAIN IS A FLAGRANT VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Nebraska uses taxpayer dollars to pay a chaplain to open each session of its legislature with prayer.[1] No lengthy analysis of cases interpreting the Establishment Clause of the First Amendment should be needed to arrive at the conclusion that this practice constitutes a flagrant violation of the Establishment Clause. It should be sufficient to remind ourselves that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast v. Cohen*, 392 U.S. 83, 103 (1968). As this Court pointed out in *Everson v. Board of Education*, 330 U.S. 1, 12 (1947), one of the principal reasons the Establishment Clause was adopted

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[1] The amici believe that the judgment of the court of appeals that Nebraska's present chaplaincy program is unconstitutional should be affirmed, but not simply because of the lengthy tenure of Nebraska's present chaplain, which was a factor the court of appeals deemed especially significant. *Chambers v. Marsh*, 675 F.2d 228, 234 (1982). Without discounting the importance of the tenure of Reverend Palmer as underscoring the improper alliance between Church and State that Nebraska's chaplaincy represents, the crucial factor that makes the Nebraska practice unconstitutional is the use of tax dollars to fund the practice. Amici submit that a program that rotated the office of legislative chaplain among a number of individuals from different faiths would still be unconstitutional if tax dollars were used to fund the program. On the other hand, if a legislature enjoyed the services of a volunteer chaplain or if the members of the legislature supported the chaplain out of their own pockets, such a legislative chaplaincy might well be constitutional. In the latter case there would be no compulsion by the government to provide financial support for religious practices and opinions.

was to ensure "that no person, either believer or nonbeliever, [would] be taxed to support a religious institution of any kind." A legislative chaplaincy is unmistakably a "religious institution", and, therefore, cannot constitutionally be supported by tax dollars.[2] One of the specific practices the Establishment Clause was designed to prevent was "[t]he imposition of taxes to pay ministers' salaries." *Id.* at 11.

Nonetheless, Petitioners and amicus curiae United States urge this Court to sustain the constitutionality of Nebraska's practice. Relying on a myopic and ahistorical interpretation of the Establishment Clause, they argue that because the First Congress had chaplains who were compensated from public funds, this is somehow dispositive of the merits of Respondent's claim. Petitioners' Brief at 24-25; Brief for the United States at 5-18. Secondly, they argue that the challenged practice is in any event constitutionally sound because it has an allegedly secular purpose and effect and does not involve an excessive entanglement between Church and State. Petitioners' Brief at 27-34; Brief for the United States at 19-32. Neither of these contentions is well-taken.

A. A Proper Understanding of the Early History of Our Country Conclusively Demonstrates That the Establishment Clause Should Not Be Given the Excessively Narrow Interpretation Urged by Petitioners

Petitioners adopt by reference the extensive analysis offered by amicus curiae United States of the early his-

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[2] Although this Court has not passed on this issue, it is possible that the use of tax dollars to support chaplaincies in the armed services or in prisons might be constitutionally proper in light of the competing free exercise rights of individuals who, under government auspices, have been removed to locations where they do not have ready access to religious services. *See, e.g., Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (upholding tax-supported prison chaplaincies). Petitioners have not even attempted to argue that the free exercise rights of Nebraska's legislators would be threatened were there no legislative chaplain in Nebraska.

tory of this country as it relates to legislative chaplains. Petitioners' Brief at 24-25; Brief for the United States at 5-18. Some of this analysis is factually mistaken,[3] and much of it is irrelevant,[4] but, in any event, this analysis is used in support of an argument that is constitutionally unsound. Distilled to its essential core, Petitioners' contention is that because the Congress that proposed the First Amendment had legislative chaplains who were compensated out of public funds, this somehow is dispositive of the merits of Respondent's claim. Petitioners' argument can be cast as follows: if Congress authorizes a practice contemporaneously with its approval of a specific constitutional amendment, that practice cannot subsequently be said to violate that amendment.

This argument has been unequivocally rejected by this Court. In *Brown v. Board of Education*, 347 U.S. 483

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[3] The United States misrepresents Madison's views on the public funding of Congressional chaplaincies. *See infra*, pp. 13-16.

[4] The First Amendment was not ratified until 1791. It was not applicable to the states until the passage of the Fourteenth Amendment, and the religion clauses of the First Amendment were not actually applied in cases involving challenges to a state's action until this century. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, discussion of the practices of the Continental Congress or of early colonial or state legislatures is not especially relevant to a determination of the precise meaning of the Establishment Clause. Almost every colony exacted some sort of tax for support of churches. *Everson*, 330 U.S. at 10 n.8 and authorities cited therein. Even after the ratification of the First Amendment, some states used tax dollars in a way that unquestionably would have violated the Establishment Clause had it been applicable to their action. Thus, for example, Massachusetts, Vermont and New Hampshire (three of the four states cited in the Brief for United States, pp. 8-9, as having had legislative chaplains) all had established churches and used tax dollars to support these churches. *See* C. Antieau, *Freedom from Federal Establishment* 168-70 (1964) and authorities cited therein; *see also Colo v. Treasurer & Receiver General*, 378 Mass. 550, 392 N.E.2d 1195, 1198-99, n.10 (1979).

(1954), this Court considered the question of whether segregated public schools violated the Fourteenth Amendment. The appellees in that case argued that because the Congress that proposed the Fourteenth Amendment,[5] and most of the states that ratified it, either permitted or required segregated schools, the Fourteenth Amendment could not be read to prohibit segregated schools. *See* Brief of Appellee Board of Education of Topeka, Shawnee County, Kansas at 28-29, *reprinted in* 49 *Landmark Briefs and Arguments of the Supreme Court of the United States* 95-96 (P. Kurland & G. Casper ed. 1975); *see also* Appendix to the Supplemental Brief for the United States on Reargument at 160 *et seq*, reprinted in 49A *Landmark Briefs* 165 *et seq.* (extensive survey of historical materials shows that over half of the ratifying states permitted or required segregated schools contemporaneously with approval of Fourteenth Amendment). The Supreme Court found this argument "inconclusive" principally because the changing role of public education cast doubt on whether those who proposed, adopted and ratified the Fourteenth Amendment would today approve of segregated schools. *Id.* at 489.

The mistake Petitioners make is that by engaging in "[a] too literal quest for the advice of the Founding Fathers", *see Abington School District v. Schempp*, 374 U.S. 203, 237 (Brennan, J. concurring), they ignore the enduring values underlying the First Amendment. Under their peculiar brand of constitutional jurisprudence, to interpret a constitutional amendment one simply looks at the actions that were approved or tolerated by those responsible for the amendment, while ignoring the historical setting for these actions. This Court has rejected such a shallow understanding of the Constitution. *Brown*, 347

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[5] In 1862, 1864, 1866 and 1874, Congress, under its legislative authority for the District of Columbia, enacted legislation which specifically provided for segregated public schools in the District of Columbia. *See Carr v. Corning*, 182 F.2d 14, 17 (D.C.Cir. 1950).

U.S. at 489. The proper inquiry is not "What did the Framers do?", but "What would the Framers do today?" This Court must ask itself whether "the practices here challenged threaten those consequences which the Framers deeply feared." *Abington School District*, 374 U.S. at 236 (Brennan, J. concurring). The fact that the First Congress had publicly-funded chaplains does not mean that the Founding Fathers would today, in light of the "profound changes" in our country's "religious composition", *id.* at 240-41 (Brennan, J. concurring), countenance such a practice. To be precise, the Framers may have thought that the payment of the salaries of Congressional chaplains out of public funds would be unobjectionable as long as the chaplains fairly represented what limited religious diversity was prevalent at that time, *i.e.*, as long as the chaplains were not chosen exclusively from one Protestant denomination. Thus, the early congresses tried to avoid any appearance of favoring one (Protestant) denomination over another by explicitly providing, through concurrent resolutions, that the chaplains were to be of different denominations. *See, e.g.*, 1 Journal of the Senate 12 (1789). Whether the Framers would have approved of Congressional chaplains had they lived in a nation with as heterogeneous a religious composition as ours today, including a substantial, albeit relatively small, number of atheists and agnostics, is extremely doubtful. As Justice Brennan has stated, our forefathers:

> knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all . . . .
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> In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive

> to many persons, the deeply devout and the nonbelievers alike.

Abington School District, 374 U.S. at 240-41 (concurring opinion) (citations and footnotes omitted).

It is especially significant with respect to the issue before this Court that atheists and agnostics, individuals likely to take offense at any government-sponsored prayer no matter how "nondenominational", were either very few in number at the time of the First Congress or, in view of the daunting legal and social burdens placed upon acknowledged atheists and agnostics, were unwilling to profess their beliefs openly.[6] There are no statistics concerning the number of atheists or agnostics in early America, but indirect evidence of their scarcity is provided by noted histories of the religious sentiments of that period which make no mention of atheism or agnosticism. *E.g.*, W. Sweet, *Religion in Colonial America* (1947). Although a substantial number of early Americans were unchurched, this was due to their "indifference", *i.e.*, their lack of predilection for any one particular (Protestant) denomination, rather than an indication of widespread ag-

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[6] Some of these legal burdens are outlined in Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L.J. 659 (1930).

Amici hasten to point out that it is not their position that only atheists would object to publicly-funded legislative prayer. Theists of many different faiths have, throughout our history, objected to government-sponsored prayer; *see infra* pp. 13-16. One of their reasons for doing so is that government-sponsored prayer is inevitably degrading to religious beliefs, *see Engel v. Vitale*, 370 U.S. 421, 431 (1962), since such prayer will come to be considered by many as a mere ceremonial adjunct to government functions. *See* Petitioners' Brief at 30 (Nebraska's legislative prayers "nothing more" than a ceremonial action). Nonetheless, the absence or scarcity of atheists and agnostics at the time of the founding of this Republic may have led some of the Founding Fathers to think that a legislative chaplaincy could be successful in accommodating everyone's religious beliefs, and, therefore, at least not be objectionable on those grounds.

nosticism or atheism. *Id.* at 336-38. Benjamin Franklin, although by no means an orthodox Christian, is reported to have said that "Atheism [in America] is unknown; infidelity rare and secret, so that persons may live to a great age in this country without having their piety shocked by meeting either an atheist or an infidel." J. Robertson, *A Short History of Free Thought* 379 (1957). Furthermore, atheists, due in part to their scarcity, were regarded as immoral or untrustworthy, even by some educated members of society, and therefore their concerns were not thought worthy of consideration by some of the Founding Fathers. In this regard it is noteworthy that Oliver Ellsworth, a member of the Constitutional Convention, later Chief Justice of the United States, and, more importantly, a Senator in the First Congress and a member of the Senate committee responsible for selecting the first Congressional chaplains, held the following view regarding the moral character of atheists and atheism:

> But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. *It has a right to prohibit and punish gross immoralities and impieties;* because the open practice of these is of evil example and detriment. *For this reason, I heartily approve of our laws against* drunkenness, profane swearing, blasphemy, and *professed atheism.*

Connecticut Courant, Dec. 17, 1787 *as quoted in* A. Stokes, *Church and State in the United States* 535 (1950) (emphasis added).

Because of the lack of religious diversity in this country at the time of the First Congress, some of the Framers understandably believed that their concern for eliminating religious strife would not necessarily be disserved as long as the government remained neutral among the sects (almost exclusively Protestant) then prevalent in the country. Some of the Framers, therefore, had no quarrel with a publicly-funded Congressional chaplaincy that

fairly represented what little diversity there was in religious viewpoints. It is noteworthy in this regard that at the Continental Congress this concern with accommodating Protestant sects was quite explicit. At that Congress there was some concern among the delegates that an opening prayer would divide them, since some were Episcopalians, some Quakers, some Anabaptists, some Presbyterians and some Congregrationalists, but Samuel Adams apparently persuaded the delegates that such a prayer need not be offensive to the members of these different (Protestant) sects. *See* Brief for the United States at 9 n.5. No mention was made of the need to accommodate Catholics, Jews, Moslems, Buddhists, agnostics or atheists.

The Framers' understandable emphasis on eliminating rivalries among Protestant sects might lead one to adopt the mistaken view that the Establishment Clause was *only* designed to eliminate rivalries among Protestant sects. This is the view implicitly adopted by Petitioners; it is also the view explicitly adopted by the nineteenth century reports of the House and Senate Judiciary Committees which upheld the constitutionality of Congressional chaplaincies. *See* Brief for the United States at 13-14. Thus, the 1854 report of the House Judiciary Committee states:

> At the time of the adoption of the constitution and the amendments, the universal sentiment was that Christianity should be encouraged—not any one sect. Any attempt to level and discard all religion, would have been viewed with universal indigation. The object was not to substitute Judaism or Mahomedanism, or infidelity, but to prevent rivalry among sects to the exclusion of others.

H. Rep. 124, 33d Cong., 1st Sess., at 6.[7] However, this limited view of the purposes of the Establishment Clause

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[7] That same report observed that "[i]n this age, there can be no substitute for Christianity; that in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 8. In these sentiments,

has not withstood analysis in contemporary Supreme Court decisions. It now is well-settled that the First Amendment was not just designed to prevent governmental preference of one Christian denomination over another, but rather to eliminate governmental support of religion in general. *E.g.*, *Flast v. Cohen*, 392 U.S. at 103; *Abington School Dist. v. Schempp*, 374 U.S. at 216; *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *Everson v. Board of Education*, 330 U.S. at 15-16; *Anderson v. Laird*, 466 F.2d 283, 287-88 (D.C. Cir.), *cert. denied* 409 U.S. 1076 (1972). This Court has recognized that in a nation as religiously diverse as ours neutrality among Protestant, or even all Christian, sects is no longer sufficient, if it ever was, to ensure religious peace and secure the requisite separation between Church and State. Because a publicly-funded legislative chaplaincy only makes constitutional sense in a setting in which neutrality among such sects *is* sufficient to preserve the underlying values of the Establishment Clause, it is clear that today public funding of legislative chaplaincies violates the Establishment Clause. Simply put, a publicly-funded legislative chaplaincy is today no more compatible with the First Amendment than segregated public schools are with the Fourteenth.

The untenability of Petitioners' theory of the case can be demonstrated by a simple hypothetical. Let us assume that the religious view of our country continue to change and that two centuries from now nontheists are in the majority, and the majority of our legislators are nontheists. Instead of publicly-funded prayers, the legislators

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it echoed the 1853 Senate Report which revelled in the recognition of a "*Christian* Sabbath, in exclusion of the Jewish or Mahommedan Sabbath", and counseled against the "spread . . . [of] the dead and revolting spectacle of atheistical apathy." S. Rep. 376, 32d Cong., 2d Sess., at 3, 4 (emphasis in original).

The fact that these reports were predicated on a mistaken understanding of the First Amendment obviously detracts from whatever deference they are due. *Cf.* Brief for the United States at 15 n.10.

have publicly-funded agnostic and atheist readings from the works of Bertrand Russell, Jean-Paul Sartre, David Hume, etc. On Petitioners' theory of the case, this practice would have to be considered constitutional because there is nothing to distinguish the hypothetical practice from the current practice other than the nature of the religious views being expressed, and surely Petitioners cannot contend that the First Amendment differentiates between religious beliefs. Yet it is also evident that the Founding Fathers would not have approved of publicly-funded agnostic and atheist readings in the halls of Congress. *See supra*, p. 10. In short, adherence to Petitioners' theory of constitutional interpretation can only result in paradoxical and unsound results.[8]

What Petitioners fail to recognize is "that it is a constitution we are expounding", *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and that "[i]n the application of a constitution, . . . our contemplation cannot be only of what has been but of what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). By attempting to focus too narrowly on what the Founding Fathers actually did, Petitioners overlook the values the Founding Fathers attempted to preserve via the First Amendment. Practices that were not inconsistent with those values in 1789 may very well, because of changed historical circumstances, undermine those values today.

One last historical note: amici cannot fail to point out that Petitioners have misrepresented the views of one of the more prominent members of the First Congress, namely James Madison. *See* Brief for the United States at 11-12. This matter might be insignificant were it not for the fact that Madison was principally responsible for the drafting

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[8] Amici, of course, do not want atheist readings in Congress; what they do want, and what they are entitled to, is a government that exercises a "wholesome 'neutrality' ", *Abington School District v. Schempp*, 374 U.S. at 222, with respect to all forms of religious belief and disbelief.

and adoption of the First Amendment, as this Court has recognized. *See Everson*, 330 U.S. at 13. Petitioners grudgingly concede that Madison was opposed to publicly-funded Congressional chaplaincies later in life,[9] but suggest that this was because he "apparently changed his mind on the chaplaincy question in later years." Brief for the United States at 12, n.8. If indeed this disapproval of publicly-funded chaplaincies were only an expression of Madison's later views, they would still have to take precedence over any contrary, earlier opinions. The Petitioners overlook the fact that in considering the opinions of any great thinker on a subject it is customary to look to that person's mature thought. One does not study Immanuel Kant's pre-*Critique* writings to determine his understanding of perception and causation. In any event, Petitioners, because of their misplaced reliance on circumstantial evidence,[10] are simply wrong about Madison's earlier views

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[9] Madison's views on the constitutionality of publicly-funded Congressional chaplaincies are eloquently set forth in his "Detached Memoranda", *see* E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946), and are reproduced in the Appendix to this brief.

[10] Petitioners rely on two facts: (1) Madison's membership on the House committee that was responsible for, among other things, regulating (*not* proposing, as Petitioners state) the appointment of chaplains, and (2) his vote in favor of a bill *one of whose provisions* provided for the compensation of Congressional chaplains. Brief for the United States at 12. However, as his "Detached Memoranda" indicate, Madison was not opposed to the appointment of chaplains; he was opposed to compensating them out of public funds. As for his vote for the compensation bill, this can be understood once it is recognized that the compensation bill, which was principally concerned with compensation for members of the House and Senate, was hotly debated, with the debate focusing on whether the members of the House and Senate should receive the same salary. I Annals of Congress 675, 679-80, 889-92 (1789); *see* 5 *Writings of James Madison* 414-15 n.1, 417 n.1 (G. Hunt ed. 1904) (letters to Monroe and Archibald Stuart indicating that the attention of the House had "for some days . . . been confined to the subject of compensation"). Indeed, the final vote in favor of the bill was

on the subject. On July 10, 1822 Madison wrote a letter to Edward Livingston in which he discussed the position he adopted in the First Congress on the propriety of funding the chaplaincies. In a passage that leaves no room for doubt, Madison wrote as follows:

> I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction . . . This has always been a favorite principle with me; *and it was not with my approbation that the deviation from it took place in Congs. when they appointed Chaplains to be paid from the Natl. Treasury.*

9 *Writings of James Madison* 100 (G. Hunt ed. 1910) (abbreviations in original; emphasis added).[11]

Madison had the sensitivity for principle and foresight that some of his colleagues lacked. He saw that as a matter of principle a publicly-funded legislative chaplaincy was questionable in a religiously homogeneous nation, and would be intolerable in a religiously diverse one.

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extremely close: 28-26. 1 Annals of Congress 891-92. The record of the debate indicates that Madison, knowing his vote was crucial, voted for the bill, because he "was extremely anxious that an accommodation should take place" between the two houses of Congress. 1 Annals of Congress 890. Thus, as is often the case with legislators, Madison, perhaps knowing he could not in any event persuade his colleagues concerning the compensation of the chaplains, presumably chose to swallow his opposition to a particular provision to ensure passage of a bill which, as a whole, he supported. It is also possible that Madison was not aware of the provision concerning the chaplains; when the bill was originally read to the House, no mention was made of compensation for the chaplains. 1 Annals of Congress 675.

[11] Petitioners are aware of this letter, yet they imply that the letter only represents Madison's views in 1822. Why then did Madison use the past tense in referring to his opposition to Congressional chaplaincies? Similarly the reference to his lack of "approbation" implies that he must have been in a position to approve or disapprove, *i.e.*, he must have been a member of Congress.

Madison recognized that a publicly-funded legislative chaplaincy, with the chaplains being elected by a majority of the legislators, "exhibit[s] in its naked deformity the doctrine that religious truth is to be tested by numbers, or that major sects have a right to govern the minor." E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946) (see Appendix). Madison understood that such an institution has no place in a country that cherishes its civil liberties. This Court should heed Madison's advice.

B. An Examination of the Chaplaincy Program in the United States Congress Demonstrates That a Publicly-Funded Legislative Chaplaincy Violates the Establishment Clause of the First Amendment

For a statute, rule or practice to survive an Establishment Clause challenge it must satisfy the criteria set forth in this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Petitioners have suggested this test is ill-suited for Establishment Clause cases not involving schools, Petitioners' Brief at 23, but as recently as this past December, in *Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025 (1982), this Court applied the *Lemon* test in an Establishment Clause case that had nothing to do with schools.

Respondent in his brief has conclusively demonstrated that Nebraska's legislative chaplaincy fails to meet any of these criteria, and it is unnecessary to burden this Court by repeating that analysis here. Amici do believe, however, that some brief observations concerning the federal practice are in order. As amicus curiae United States has stated, "the Court's consideration of Nebraska's practice [should] be enhanced by a complete exposition of the federal experience." Brief for the United States at 2.

Petitioners' strategy in defending Nebraska's practice is obvious. It is to portray the legislative prayer practice as being a completely innocuous, essentially meaningless

ceremony, that is of no practical significance to the legislators, let alone anyone outside of the legislature. *See, e.g.*, Petitioners' Brief at 18 (practice has not been viewed "as that big of an issue"). The prayers of Nebraska's chaplain are supposed to simply reflect the "civil religion of America." Petitioners' Brief at 11. The prayers of Nebraska's chaplain are most decidedly not designed "to advance any religious view." Petitioners' Brief at 27.

Even if Nebraska's chaplain has, *per impossible*, managed to drain his prayers of religious significance, the practice would still run afoul of the First Amendment for at least two reasons. First, Nebraska's practice would have succeeded in completely secularizing (and thereby degrading) prayer and religious belief, which is, of course, exactly what many of the Framers feared would be the effect of government support of religion. Indeed, Petitioners' invocation of the "civil religion of America" is highly ironic since a nationwide civil religion is precisely what the Framers wanted to avoid. *See Everson v. Board of Education*, 330 U.S. at 67 (appendix to dissenting opinion of Rutledge, J., containing Madison's Memorial and Remonstrance Against Religious Assessments) (warning against employing religion as an engine of civil policy).

Secondly, a legislative chaplaincy is clearly an institution that can be so utilized as to have the effect of advancing religion, even if some legislative chaplaincies may not have that effect in practice. Amici are not aware of any standards or rules, in any of this nation's legislatures, prescribing what legislative chaplains may or may not say in their prayers.[12] Simply because some legislative chaplains may try to make their prayers as bland and in-

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[12] If a state or Congress did try to prescribe rules as to what legislative chaplains could or could not say, this would, of course, result in an excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. at 619.

There is a simple solution to this dilemma: stop paying the chaplains with public funds.

offensive as possible and not consciously use them as a vehicle for advancing a certain religious viewpoint does not mean that all chaplains will do so. This clear potential for abuse is sufficient to make the practice unconstitutional. *Larkin v. Grendel's Den*, 51 U.S.L.W. at 4028; *Lemon v. Kurtzman*, 403 U.S. at 618-19.

The federal practice is instructive in this regard. A quick scan of the Congressional Record for just the past several months reveals that our nation's legislators are routinely urged by the chaplains in Congress to accept the view that without a belief in God and adherence to His laws there can be "no morality, no justice", 128 Cong. Rec. S 2887 (daily ed. March 29, 1982); that those who believe in evolution are nihilists since "our system of values would be nonexistent if our Founding Fathers had declared: '. . . that all men are descended from monkeys' ", 128 Cong. Rec. S 4115 (daily ed. April 28, 1982); that God "turneth the Godless to destruction", 128 Cong. Rec. S 8165 (daily ed. July 14, 1982); that when "we fail to recognize and honor" God, "the one who created equality and . . . human rights, we forfeit both", 128 Cong. Rec. S 7239 (daily ed. June 22, 1982); that we must beg forgiveness for "the secularism, the antisupernaturalism which we have exchanged for faith in a Creator God", 128 Cong. Rec. S 9095 (daily ed. July 26, 1982); that "we diminish our humanness when we refuse" to worship God, 128 Cong. Rec. S 11133 (daily ed. Sept. 8, 1982); that "the God-factor is fundamental to our system, that if we refuse to be 'governed by God', we will be ruled by tyrants", 128 Cong. Rec. S 12361 (daily ed. Sept. 28, 1982), that it is lamentable when "[w]e profess faith, but practice atheism", 128 Cong. Rec. S 12445 (daily ed. Sept. 29, 1982); and that "our rights are secure only as we take God seriously", 128 Cong. Rec. S 13623 (daily ed. Dec. 1, 1982).

These prayers offered by Congress' chaplains have the undeniable purpose and effect of advancing a particular religious viewpoint. These prayers not only implicitly en-

dorse belief in God by the mere fact that they are being offered, but are also used as vehicles for expressly urging the legislators to believe in God, since, according to the chaplains, disbelief will lead to a situation in which there is "no morality, no justice," and in which "we will be ruled by tyrants" who are less than fully human. Amici are, to say the least, offended by these remarks, which are subsidized by their tax dollars, as any Christian, Jew, Buddhist or Moslem would understandably be offended were they forced to subsidize sermons to our nation's legislators which branded them as immoral and less than fully human simply because of what they believed. But whether the chaplains are correct in saying atheists are immoral or less than fully human is beside the point. What is important is that through their prayers the chaplains advance a particular religious viewpoint, and, therefore, they have no right to expect this nation's taxpayers to provide them with the funds for doing so. "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" *Everson*, 330 U.S. at 15-16.

That the chaplains' prayers are delivered in the halls of Congress makes the constitutional violation all the more egregious. Whether or not anyone outside of the Nebraska legislature is aware of its chaplaincy program, (*see* Petitioners' Brief at 32) it cannot be denied that the existence and activities of the Congressional chaplains are well-known to the American public, and those who favor, rightly or wrongly, closer ties between Church and State unfailingly point to the chaplains and/or their activities as a means of buttressing their arguments. *See, e.g.*, Remarks at the Alfred M. Landon Lecture Series, 18 Weekly Comp. Pres. Doc. 1116 (Sept. 9, 1982); Remarks at the Centennial Meeting of the Supreme Council of the Knights of Columbus, 18 Weekly Comp. Pres. Doc. 996

(Aug. 3, 1982); Washington Times, May 17, 1982, at 8A, cols. 1 and 6; *see also* Letter from Edward E. McAteer, President, Roundtable Issues and Answers, to "Dear Friend" (undated but received by counsel for amici Aug. 30, 1982) (asking that postcards be sent to Chief Justice Burger urging him to keep chaplains in Congress).[18] Even relatively obscure newspapers have seen fit to comment on the Congressional chaplaincies, in terms that indicate the divisiveness of the practice. *See, e.g.*, Evening Journal [Martinsburg, W. Va.], March 31, 1982 at 4, col. 1 (editorial urging amicus O'Hair to "go straight to hell" for challenging the chaplaincy program). The employment of chaplains by Congress thus results in an appearance of government sponsorship, on a national level, of sectarian practices and beliefs that clearly "provides a significant symbolic benefit to religion in the minds of some." This is sufficient to render the practice unconstitutional. *Larkin v. Grendel's Den*, 51 U.S.L.W. at 4028.

But the Congressional chaplains are not engaged in purely symbolic exercises. To the contrary the prayers of the chaplains are not "mere symbolic gesture[s]," but "actually play a role of importance in the work of the Congress." Prayers Offered by the Chaplain Rev. Edward Gardner Latch at the Opening of the Daily Sessions of the House of Representatives During the Ninety-Fourth and Ninety-Fifth Congress viii-ix (1979) (remarks of Rep. Wright). This important role of prayers in the work of Congress is clearly significant since the legislative authority of Congress can be exercised, and has been exercised, in ways prejudicial to the interests of religious dissenters. *See, e.g.*, 110 Cong. Rec. 2607 (1964) *reprinted in* Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3101 (remarks of Rep. Ashbrook in favor of amendment, which passed the House, but was deleted from final bill, excluding atheists from protection of the Act). The prayers of the chaplains can be used, and, as already indicated, are being used, to persuade our nation's

[18] A copy of this letter will be filed with the Clerk of this Court.

legislators that some religious dissenters, *i.e.*, those who do not believe in God, are immoral and/or less than fully human. Forcing an individual to support a religious institution with which he disagrees is contrary to the letter and spirit of the Establishment Clause, but to require religious dissenters to support with their tax dollars a religious institution that is also inimical to their own self-interest would render the Establishment Clause meaningless. Let us recall that that Clause was prompted in part by the outrage of "dissenters [who] were compelled to pay . . . taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Everson*, 330 U.S. at 10.[14]

Amicus curiae United States urges this Court to uphold the constitutionality of paid legislative chaplains because "it [is not] plausible to suggest that paid legislative chaplaincies are 'but the . . . "nose of the camel in the tent" leading to an established church'." Brief for the United States at 32. This misses the point. If religious dissenters can be forced to pay their tax dollars for sermons to our nation's legislators which on a routine basis deride and ridicule the beliefs of these dissenters then the camel of religious oppression has already entered and trampled the tent housing our nation's civil liberties.

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[14] Amicus curiae United States has argued that the primary effect of the Congressional practice is not the advancement of religion since attendance during the reading of the prayers is not compulsory. Brief for United States pp. 26-27 n.18. This is a thoroughly muddled argument. A statute or practice is not any less unconstitutional simply because it is not the most efficacious way of achieving a religious goal. The test is whether, among the effects the statute or practice *does* have, its primary effect is the advancement (or inhibition) of religion. *Lemon v. Kurtzman*, 403 U.S. at 612. Amicus curiae United States overlooks the fact that the lack of compulsory attendance might also undermine the efficaciousness of alleged secular consequences, such as "bringing the legislature to order." Brief for United States at 28.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation?

The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected (by the majority) shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.

If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents shd discharge their religious duties, let them like their Constituents, do so at their own expenses. How small a contribution from each member of Congress wd suffice for

the purpose? How just wd it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience? Why should the expense of a religous worship be allowed for the Legislature, to be paid by the public, more than that for the Ex. or Judiciary branch of the Government?

J. Madison, Detached Memoranda, *reprinted in* E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946).

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICUS CURIAE* NOT SUPPORTING EITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The National Conference of State Legislatures (NCSL), pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, submits this brief as *amicus curiae*.

NCSL has received written consent from the parties to file this brief as *amicus curiae*. Copies of these letters have been filed with the Clerk of the Court.

NCSL is the official representative of the nation's 7,500 state legislators and their staffs. It is a nonpartisan organization funded by the states with three basic objectives: to improve the quality and effectiveness of state legislatures; to foster interstate cooperation and communication; and to assure state legislatures a strong, cohesive voice in the federal system.

It is NCSL's belief that the resolution of this litigation could have far-reaching effects not only on the parties to this litigation but upon other state legislatures as well.

NCSL also believes that the record before the Court does not contain information on the relevant practices of legislative bodies other than on those of the legislature of Nebraska. Therefore, NCSL has undertaken a survey of the remaining 98 state legislative bodies to determine their practices and procedures with respect to the offering of prayer in the legislatures and the employment of clergymen or chaplains.

SUMMARY OF ARGUMENT

In late November and early December 1982, NCSL conducted a survey of the practices and procedures relating to the offering of prayer in state legislative bodies and the employment of chaplains or clergymen to offer the prayers. The legislative clerks in each of the 98 legislative bodies were contacted by telephone and asked a series of questions. Nebraska was excluded from the survey since its practices are well documented in the court record. The results of this survey are reported in the following section.

ARGUMENT

SURVEY OF STATE LEGISLATURES ON PRACTICES AND PROCEDURES RELATING TO PRAYER AND THE EMPLOYMENT OF CHAPLAINS AND CLERGYMEN BY STATE LEGISLATIVE BODIES

All state legislative bodies open their sessions with a prayer except for the Massachusetts Senate, which does so only occasionally. Authority to do so is usually found in the rules of the legislative body and is most commonly contained in the rule providing for the order of business. In those states where the rules do not offer specific direction, the prayer is given as a matter of custom or tradition.

The opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, legislators, and legislative staff members.

A list of states that have regular chaplains serving at least a session of the legislature are listed below. Their compensation is also noted.

Arkansas Senate ($25 per diem)
California Assembly ($400 per month)
California Senate ($600 per month)
Colorado Senate (3 chaplains; 1 rabbi, 2 Protestants) ($18.46 per diem)
Connecticut House of Representatives ($3,000 per session)
Connecticut Senate ($3,000 per session)
Idaho House of Representatives ($15 per diem)
Idaho Senate ($15 per diem)
Kansas House of Representatives ($349-525 per month)
Kansas Senate ($349-525 per month)
Massachusetts House of Representatives ($10,500 per annum)
Missouri House of Representatives (2 chaplains; 1 Protestant, 1 Catholic) ($325 per month)
Missouri Senate ($600 per month)
Montana House of Representatives ($10 per diem)
Montana Senate ($10 per diem)
New Hampshire House of Representatives ($10 per diem)
New Hampshire Senate ($11 per diem)
New York Assembly ($11,600 per annum)
North Carolina House of Representatives ($103 per week)
North Carolina Senate ($103 per week)
Ohio House of Representatives ($4,492.80 per annum)
South Carolina House of Representatives ($5,818 for 6 months, prorated if session exceeds 6 months)
South Carolina Senate ($5,818 per annum)
Texas House of Representatives (no compensation)
Texas Senate (no compensation)
West Virginia Senate ($17 per diem)
Wyoming Senate ($20 per diem)

The remaining legislative houses employ guest ministers or their own members and staff serving for only a day, week, or month. The most common practice is to rely on ministers from the capital city area. All bodies, including those with regular chaplains, honor requests from individual legislators either to give the opening prayer or to invite a constituent minister to conduct the prayer.

All the legislative bodies with regular chaplains permit their reappointment. A few have served for many years but most have

briefer tenures in keeping with their ceremonial status. Leadership changes in the legislative body generally result in the appointment of a new chaplain since it is usually a leadership prerogative.

In the following states, the chaplain is appointed for a session of the legislature:

California Senate
Colorado Senate
Connecticut
Idaho
Kansas
Missouri
Montana
New Hampshire
Texas
Wyoming Senate

The remaining bodies with regular chaplains appoint them for two-year terms except for the South Carolina Senate, which specifies a four-year term.

Legislatures in the following 16 states provide no compensation to chaplains or clergymen:

Alabama
Arizona House of Representatives
Arkansas House of Representatives
Hawaii
Indiana
Kentucky ($1,800 annually is donated to local ministerial association)
Louisiana
Michigan
Mississippi
Oregon
Rhode Island
Tennessee (clergyman receives certificate)
Texas
Utah
Virginia (Senate provides mileage allowance and House gives token gift)
West Virginia House of Representatives ($15 honorarium on occasional basis)

The remaining legislatures provide some type of payment or per diem for their guest clergymen.

Alaska ($40-50 per diem)
Arizona Senate ($10 per diem)
Colorado House of Representatives ($18.46 per diem)
Delaware ($25 per diem)
Florida ($40 per diem)
Georgia ($25 per diem)
Illinois House of Representatives ($30 per diem)
Illinois Senate ($25 per diem if clergyman is local, $50 if from out of town)
Iowa ($10 per diem)
Maine House of Representatives ($25 per diem)
Maine Senate ($10 per diem)
Maryland ($15 per diem)
Massachusetts Senate ($40 per diem on occasions when prayer is given)
Minnesota House of Representatives ($22 per diem)
Minnesota Senate ($25 per diem)
Nevada ($20 per diem)
New Jersey General Assembly ($75 per diem)
New Jersey Senate ($75 per diem)
New Mexico ($5 per diem)
New York Senate ($35 per diem)
North Dakota ($25 per diem)
Oklahoma House of Representatives ($44 per diem)
Oklahoma Senate ($125 per week)
Pennsylvania House of Representatives ($750 per month)
Pennsylvania Senate ($40 per diem)
South Dakota ($10 per diem donated to ministerial association)
Vermont ($5 per diem)
Washington ($15 per diem)
West Virginia House of Delegates ($15 per diem on occasional basis)
Wisconsin Assembly ($5 per diem)
Wisconsin Senate ($10 per diem)

The funds to pay the per diem of guest clergymen or the compensation to pay for regular chaplains is taken from the legislative budgets of the states.

Only a few legislative bodies actually print a separate document containing prayers. In most instances, a journal entry notes

that the prayer was given. Some legislatures print the text of the prayer in the journal. Those states currently publishing the prayer in a special document include:

California
Georgia House of Representatives
Kansas Senate
Ohio House of Representatives
South Carolina

CONCLUSION

NCSL takes no position and draws no conclusions as to the constitutionality or legality of any state's practices or procedures, nor does it support the position of either litigant. Instead, it merely reports the survey results for the consideration of the Court.

Dated at Denver, Colorado this 15th day of December, 1982.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of the Nebraska Unicameral Legislature's chaplaincy practice under the Establishment Clause of the First Amendment. The United States has a substantial interest in this matter because the United States Congress has, since the first session of the Continental Congress in 1774, appointed chaplains to open each legislative day with an invocation. Over a half-century ago, a challenge to the constitutionality of the federal chaplaincy practice was dismissed for lack of standing. *Elliott* v. *White*, 23 F.2d 997 (D.C. Cir. 1928). A similar challenge is now pending before the United States Court of Appeals for the District of Columbia Circuit for determination by the court en banc of whether the suit must be dismissed on standing or political question grounds. *Murray* v. *Buchanan*,

No. 81-1301 (Mar. 9, 1982), vacated and scheduled for rehearing en banc by orders of May 25 and July 16, 1982.

Although the constitutionality of the chaplaincy practice of the Senate and House of Representatives may not be justiciable, that issue has not been finally resolved by this Court. But see *Abington School District* v. *Schempp*, 374 U.S. 203, 300 (1963) (Brennan, J., concurring).[1] Accordingly, the United States retains a keen interest in the Court's ruling in this case because the Nebraska Legislature's chaplaincy bears many basic similarities to the congressional chaplaincies. Moreover, the Nebraska practice is clearly patterned after the longstanding practice of Congress and the other states; thus, the Court's consideration of Nebraska's practice would be enhanced by a complete exposition of the federal experience.

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment is not violated by the Nebraska Legislature's appointment and compensation of a chaplain to open each day's legislative session with a prayer. The constitutionality of paid legislative chaplaincies is conclusively demonstrated by the fact that the Members of the First Congress appointed and compensated chaplains to open their daily sessions at the same time that they drafted the First Amendment; historical analysis thus shows that the Framers did not intend to invalidate their own chaplaincy, nor those of the states. But, even if more need be shown, the constitutional propriety of the Nebraska chaplaincy is confirmed by application of the now traditional three-part Estab-

[1] With regard to the question of standing to challenge a legislative chaplaincy, we note that the courts below held that respondent Chambers had standing to challenge the Nebraska practice not merely as a state taxpayer but as a member of the State Legislature who personally confronts the morning invocation on a daily basis (Pet. App. 22 n.3, 23-24 n.14, 28-29). This circumstance distinguishes the standing issue in this case, which petitioners do not press in this Court, from the federal taxpayer standing issue involved in *Murray* v. *Buchanan*, *supra*.

lishment Clause test announced by the Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

1. At the national level, the designation of legislative chaplains originated with the first session of the Continental Congress in September 1774 and was carried forward by the First Congress convened under the Constitution. Indeed, the very first congressional compensation act included authority to pay "each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress." Act of Sept. 22, 1789, ch. XVII, Section 4, 1 Stat. 71.

Just three days after enactment of the congressional compensation statute, the Members of the First Congress reached final agreement on the wording and content of the Bill of Rights, including the Establishment Clause, and referred the proposed amendments to the states for ratification. See 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 26 (1789); 1 Journal of the Senate, 1st Cong., 1st Sess. 16 (1789). It is apparent from this simultaneous consideration by the First Congress of the appointment and compensation of chaplains, on the one hand, and the framing of the Establishment Clause, on the other, that the Members of the First Congress did not consider their own legislative chaplaincy to run afoul of the Establishment Clause. It should therefore come as no surprise that the congressional chaplaincy practice continued without interruption after the Bill of Rights became part of the Constitution on December 15, 1791. That being so, Nebraska's virtually identical practice is equally permissible under the Establishment Clause, which is made applicable to the states by incorporation into the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

2. In light of the historical evidence of the Framers' intent, it should not be necessary to analyze the Nebraska chaplaincy further under the three-part test announced by this Court in *Lemon* v. *Kurtzman*, *supra*. The *Lemon* test is merely a device for discerning the proper meaning of the Establishment Clause and for applying its

restrictions in a modern-day context. In this case, where the challenged practice is one that was actually engaged in by the Framers themselves, and where the intended meaning and scope of the Establishment Clause in this context is clear, application of the *Lemon* test would seem superfluous. Nevertheless, a review of the Nebraska chaplaincy under that test confirms that the legislative chaplaincy practice is constitutionally sound.

The district court found, and the trial record reflects, that the Nebraska chaplain's opening invocation has the "clearly secular purpose" of "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner" (Pet. App. 13). The trial court also found on the basis of the record that the opening invocation does not have a primary effect of advancing or inhibiting religion (Pet. App. 14-15). Finally, the district court found no evidence to indicate that Nebraska's legislative chaplaincy has resulted in an excessive governmental entanglement with religion (Pet. App. 18).

The court of appeals' disagreement with the district court was based solely on its own assumptions, and those assumptions cannot withstand reasoned analysis. The court's main objections to the Nebraska practice "viewed as a whole" (Pet. App. 34) were the chaplain's lengthy tenure, the resulting fact that only one religious denomination has been represented in the chaplaincy for many years, and the fact that the chaplain receives compensation for performing his duties (Pet. App. 36, 38). None of these features distinguishes the Nebraska chaplaincy from the traditional federal practice or, for that matter, from the Massachusetts practice upheld in *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195 (1979).

In any event, the length of a particular chaplain's service as a legislative officer and the particular religious denomination to which he subscribes is wholly irrelevant to his secular purpose of bringing the legislature to order in a traditional, ceremonial manner that establishes a proper tone of solemnity for the day's proceedings. The

record in this case establishes that the Nebraska chaplain's prayers are nondenominational and that he advocates no particular religious dogma. Accordingly, his formal religious affiliation is of no particular concern.

Furthermore, once it is shown that the chaplain performs a predominantly secular function, there can be no legitimate constitutional objection to paying for his services any more than one could object to paying any of Nebraska's other legislative officers. See, *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 746 & n.13 (1976) (plurality opinion).

Finally, this Court has observed in a similar Establishment Clause setting that "an unbroken practice * * * is not something to be lightly cast aside." *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970). This Nation has employed legislative chaplains for over 200 years without posing any threat to religious liberty. In light of this history, it cannot be plausibly suggested that the legislative chaplaincy is "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*ibid.*).

ARGUMENT

THE NEBRASKA LEGISLATURE'S APPOINTMENT AND COMPENSATION OF A CHAPLAIN TO OPEN EACH DAY'S SESSION OF THE LEGISLATURE WITH A PRAYER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Beginning in 1855, even before attaining statehood, Nebraska opened the daily sessions of its Legislature with a prayer by the chaplain (Pet. App. 11, 22 n.5). In 1867, the year Nebraska became a state, the Legislature provided that the chaplain would be a compensated officer with the duty of opening each legislative session with a prayer (*id.* at 11, 23 n.6). This practice has remained unchanged to the present day; the Rules of the Nebraska Unicameral Legislature provide that "Prayer by the

Chaplain" shall be the first item on the agenda, to precede even the taking of the "Roll cali" (Rule 7A, Section 1(b)) (Pet. 5).

The Nebraska Legislature is not alone in establishing this kind of chaplaincy practice. Every state of the Union opens its legislative sessions with a prayer and, like Nebraska, 17 other states utilize a salaried chaplain for this purpose. See *Colo* v. *Treasurer & Receiver General, supra*, 392 N.E.2d at 1197. In addition, as previously mentioned, each House of the United States Congress appoints and compensates a chaplain whose duty it is to open each day's session with a prayer. See United States Senate Rule IV; United States House of Representatives Rule VII. It is apparent that the Nebraska chaplaincy practice instituted in 1855 grew out of the traditional legislative ceremonial practice already long-established in the existing states as well as in the federal Congress.

An examination of the history of legislative chaplaincies in the United States and the experience of the Congress before, during and after ratification of the First Amendment reveals that the Framers did not intend to invalidate under the Establishment Clause the kind of legislative chaplaincy that now exists in Nebraska.[2] The historical evidence of the Framers' intent is so conclusive that no further inquiry should be necessary in order to determine that the Nebraska chaplaincy is constitutionally permissible. Nevertheless, as we show in Part B of this brief, the Nebraska chaplaincy also passes constitutional muster under the now familiar three-part test articulated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

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[2] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." Those provisions have been made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

A. The Historical Evidence Conclusively Shows That the Establishment Clause of the First Amendment Does Not Proscribe the Practice of Opening a Legislature's Day with Prayer by a Compensated Chaplain

This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). See also *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676 (1970). The Court has often undertaken a thorough historical examination in order to shed light on the meaning and proper application of the Establishment and Free Exercise Clauses to particular circumstances, and it has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*" (*id.* at 671; emphasis added). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) (history of Sunday Closing Laws relevant to Establishment Clause inquiry); *Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947) (history of period when Establishment Clause was fashioned and adopted is relevant to determination of validity of modern state law authorizing reimbursement for student transportation to private schools).

In the instant case, the appropriateness of historical review is more compelling, and the results are more instructive and conclusive, than in any Establishment Clause case previously considered by this Court. The very governmental practice challenged here—the utilization of a salaried chaplain to open daily legislative sessions with a prayer—is one that predated the Constitution, was adopted by the Founding Fathers from the outset of the First Congress convened under the Constitution, was continued by the Framers of the First Amendment while the Establishment Clause itself was being fashioned and rati-

fied by the states, and has continued substantially unchanged to the present day.[3]

1. The origins of the congressional chaplaincies can be traced to the American colonies. See, *e.g.*, Journal of the House of Burgesses of Virginia 34, 36 (Nov. 20 & 21, 1712); Votes and Proceedings of the Lower House of Assembly of the Province of Maryland 4 (Dec. 12, 1754). In Virginia, for example, the first item of business at the Virginia Colony Convention of Delegates was a resolution "[t]hat the Reverend Thomas Price be appointed chaplain to this Convention, and that he be desired to read prayers every morning at 10 o'clock." Proceedings of the Virginia Convention of Delegates, 1775-1776, at 59 (Dec. 5, 1775). At the conclusion of the session, the Convention provided for allowances "to the several officers of this Convention," including the chaplain (*id.* at 102 (Jan. 20, 1776)).

Virginia continued this chaplaincy practice when its legislature convened for the first time under the state constitution on October 7, 1776. The House of Delegates ordered that "the several officers of the late Convention be continued officers of this House" and further prescribed that "the Chaplain attend to read prayers every morning at seven o'clock * * *." Journal of the House of Delegates

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[3] Thus, the lesson of history in this case is even clearer than in *Walz*, where the Court carefully considered and placed substantial emphasis on the lengthy history of tax exemptions for places of worship. See 397 U.S. at 676-680. The earliest federal taxing statute cited in *Walz* that could be regarded as incorporating a tax exemption for church property was enacted by Congress in 1798—seven years after the ratification of the First Amendment. See 397 U.S. at 677 n.5. In contrast, the United States Congress' practice of appointing and compensating its legislative chaplains for the purpose of delivering opening prayers began in the First Congress, continued during the framing of the First Amendment, and remained intact after the First Amendment's adoption in 1791. See A. Stokes & L. Pfeffer, *Church and State in the United States* 83-84, 478-482 (Harper & Rowe rev. 1st ed. 1964).

of Virginia 1 (Oct. 7, 1776). Other state legislatures adopted similar chaplaincy practices.[4]

2. At the national level, the designation of legislative chaplains can be traced to the first session of the Continental Congress in September 1774, where the delegates resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited Episcopalian clergyman—the Reverend Jacob Duché. 1 Journals of the Continental Congress 26 (1774) (hereinafter cited as "Journals").[5] Accordingly, the first opening prayer was recited on September 7, 1774 (*id.* at 27). Reverend Duché was subsequently invited back to deliver an opening prayer on May 11, 1775, the second day of the second session of the Continental Congress. 2 Journals 12, 13 (1775). In July 1776, Reverend Duché was "appointed chaplain to Congress" and charged with opening each day's proceedings on a regular basis. 5 Journals 530 (1776). Upon his resignation on October 17, 1776, the Continental Congress voted a $150 stipend for his services. 6 Journals 886-887 (1776).

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[4] See Journal of the Proceedings of the General Assembly of the State of Vermont 7, 63 (Feb. 23 & Mar. 9, 1784); Journal of the House of Representatives of the Commonwealth of Massachusetts 350 (Mar. 14, 1785); Journals of the Proceedings of the Senate and House of Representatives of the State of New Hampshire 66, 100 (Feb. 19 & 23, 1785).

[5] By letter of September 16, 1774, John Adams described this event to Abigail Adams in the following manner:

> When the Congress first met, Mr. Cushing made a Motion, that it should be opened with Prayer. It was opposed by Mr. Jay of N. York and Mr. Rutledge of South Carolina, because we were so divided in religious Sentiments, some Episcopalians, some Quakers, some anabaptists, some Presbyterians, and some Congregationalists, so that We could not join in the same Act of Worship. Mr. S. Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same Time a Friend to his Country.

Letter from John Adams to Abigail Adams (Sept. 16, 1774) *reprinted in* P. Smith, 1 *Letters of Delegates to Congress, 1774-1789*, at 74 (1976). See also H.R. Rep. No. 124, 33d Cong., 1st Sess. 2 (1854) (Mr. Webster's account).

Within a short time, on December 23, 1776, the Continental Congress elected two new chaplains—the Reverends Patrick Allison and William White. 6 Journals 1034 (1776). Eight years later, the Continental Congress decided that elections for these officers should be held annually. 27 Journals 683 (1784).

3. The practice of appointing chaplains to serve during legislative sessions continued from the very outset of the First Congress convened under the Constitution.[6] The First Congress met in April 1789, and among its first items of business was the selection of chaplains. See 1 Journal of the Senate, 1st Cong., 1st Sess. 10 (1789) (hereinafter "Senate J."); 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 11-12 (1789) (hereinafter "House J."). The House and Senate soon agreed that "two Chaplains of different denominations be appointed to Congress," one to be elected by each House and

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[6] At the Federal Constitutional Convention, Benjamin Franklin had proposed that each day's session be opened with prayer. His motion was made on June 28, 1787, more than a month after the convention began, and no action was taken on it. See 5 J. Elliot, *Debates on the Adoption of the Federal Constitution* 253-255 (2d ed. 1836) (1st ed. 1830). Among other things, the delegates were concerned about lack of funds for a chaplain's pay and the fact that institution of a prayer practice at that late date might highlight the absence of prayers at the prior sessions. *Ibid.*; see also, A. Stokes & L. Pfeffer, *supra*, at 84. It should also be noted that at least six ratifying conventions (Massachusetts, Connecticut, New Jersey, New York, Rhode Island, and Virginia) elected chaplains as officers or had visiting ministers deliver opening prayers. See Debates, Resolutions and Other Proceedings of the Convention of the Commonwealth of Massachusetts 24 (Jan. 9, 1788); 2 J. Elliot, *supra*, at 2; Litchfield Monitor (Conn.) 5 (Jan. 14, 1788); Pennsylvania Packet (Dec. 15, 1787); New Jersey Minutes of the Convention 7 (Dec. 13, 1787); Journal of the Convention of New York 7 (June 17, 1788); W. Staples, *Rhode Island in the Continental Congress, 1765-1790*, at 668, 670, 674 (1971); Debates and Other Proceedings of the Convention of Virginia 13 (June 2, 1788); 3 J. Elliot, *supra*, at 1. The Virginia Convention compensated its appointed chaplain for his services. Debates and Other Proceedings of the Convention of Virginia, *supra*, at 470; 3 J. Elliot, *supra*, at 657.

interchanged weekly. 1 Senate J. 12; 1 House J. 16. The Senate elected the first chaplain on April 25, 1789, and the House elected the second chaplain on May 1. 1 Senate J. 16; 1 House J. 26.

A few months later, the first statutory authority for compensation of members and officers of the House and Senate was enacted. Act of Sept. 22, 1789, ch. XVII, 1 Stat. 70. Included in the provisions for compensation of officers was authority to pay "each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress" (Section 4, 1 Stat. 71).

During this same period of time, Members of Congress had been conferring on a draft of the Bill of Rights, including provisions of the First Amendment. James Madison, whose leading role in the drafting and adoption of the First Amendment has been widely acknowledged,[7] introduced the initial draft of the Bill of Rights in the House on June 8, 1789. See II B. Schwartz, *The Bill of Rights: A Documentary History* 1026 (1971). With respect to religious liberties, this draft provided that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established * * *" (*ibid.*). During the course of debate, this language was modified to its current form in the Free Exercise and Establishment Clauses. See *Everson* v. *Board of Education*, *supra*, 330 U.S. at 39 n.27 (Rutledge, J., dissenting). Final agreement on the wording and content of the Bill of Rights was reached by both Houses of Congress on September 25, 1789—just three days after enactment of the legislation providing compensation for the congressional chaplains. 1 House J. 121; 1 Senate J. 88. The first proposed amendments to the Constitution were then referred to the several states for ratification.

It is apparent from this simultaneous consideration by the First Congress of the appointment and compensation of chaplains, on the one hand, and the framing of the Es-

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[7] See, *e.g.*, *Everson* v. *Board of Education*, *supra*, 330 U.S. at 13; *id.* at 28, 31-43 (Rutledge, J., dissenting).

tablishment Clause, on the other, that the Members of the First Congress neither perceived nor intended any friction between legislative chaplaincies and the First Amendment. Indeed, James Madison himself was a member of the House Committee that proposed appointment of a chaplain. See 1 House J. 12. And he voted in favor of the bill to compensate the officers of the House and Senate, including the two chaplains (*id.* at 108-109).[8]

The Bill of Rights was ratified on December 15, 1791, when the Virginia Senate approved it. See II B. Schwartz, *supra*, at 1202. In the first session of Congress after the ratification of the First Amendment (the Second Session of the Second Congress), the House and Senate continued their practice of electing chaplains. See 1 Journal of the House of Representatives, 2d Cong., 2d Sess. 610 (1792); 1 Journal of the Senate, 2d Cong., 2d Sess. 452 (1792). And when the Fourth Congress authorized compensation for officers of the House and Senate, it again provided for compensation to the chaplains. Act of Mar. 10, 1796, ch. IV, Section 3, 1 Stat. 449.

4. This chaplaincy practice in the United States Congress has remained essentially unchanged throughout its history of almost two centuries.[9] In the middle of the

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[8] Madison apparently changed his mind on the chaplaincy question in later years. In his letter of July 10, 1822, to Edward Livingston, Madison indicated that he did not approve of the practice. See 9 Writings of James Madison 100 (G. Hunt ed. 1910). And in his "Detached Memoranda," Madison elaborated further on his objections. See L. Pfeffer, *Church State and Freedom* 248-249 (Beacon Press rev. ed. 1967), quoting E. Fleet, *Madison's "Detached Memoranda," III William and Mary Quarterly* 558-559 (1946). These objections, however, came more than three decades after the First Congress appointed its chaplains in 1789 and the states ratified the First Amendment in 1791. They do not reflect Madison's beliefs while serving in the First Congress.

[9] Two matters warrant mention in this regard. First, for a brief time during the 1850's, both Houses of Congress temporarily abandoned the practice of electing regular chaplains and instead invited local clergymen to officiate on a rotating basis. See Cong. Globe, 35th Cong., 1st Sess. 14, 28 (1857). Dissatisfaction with this procedure, however, soon led to a return to the annual appointment

last century, there was considerable discussion within the Congress itself over the constitutionality and desirability of maintaining federal chaplaincies in the House and Senate as well as in the military. See A. Stokes & L. Pfeffer, *supra*, at 479-480. Various memorials and petitions by citizens were referred to the House and Senate Committees on the Judiciary for consideration. The committee deliberations resulted in the issuance of three reports—in 1850, 1853 and 1854—tracing the history of the federal chaplaincies in this country and concluding that they were sound both as a matter of constitutional jurisprudence and public policy. See H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850); S. Rep. No. 376, 32d Cong., 2d Sess. (1853); H.R. Rep. No. 124, 33d Cong., 1st Sess. (1854).

Of particular relevance is the following passage from the 1853 Senate Report (S. Rep. No. 376, *supra*, at 4):

> [F]rom the beginning, our government has had chaplains in its employment. If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government—

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of chaplains as officers of each House. See Cong. Globe, 36th Cong., 1st Sess. 97-98, 162 (1859); *id.* at 1016 (1860).

Second, although the Senate and House have always selected their own chaplains, the original agreement between the Houses contemplated that each House's chaplain would be of a different denomination and would be exchanged on a weekly basis with the other House. See 1 Senate J. 12; 1 House J. 16. This practice was abandoned in 1856, when the House elected a chaplain without making any provision for weekly rotation. See Cong. Globe, 34th Cong., 1st Sess. 486 (1856). Since that time, each House of Congress has elected its own chaplain without reference to the other House. As it happens, however, the two Houses have continued to elect chaplains of different denominations. Compare Chaplains of the United States Senate, April 25, 1789 to Date (December 8, 1982), on file in the Office of the United States Senate Historian, with *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965). (We have lodged a copy of these documents with the Clerk of this Court.)

> were in Congress and in the Presidency when this constitutional amendment was adopted? They were wise to discover the true character of the measure; they, if any one did, understood the true purport of the amendment, and were bound, by their duty and their oaths, to resist the introduction or continuance of chaplains, if the views of the petitioners were correct. But they did no such thing; and therefore we have the strongest reason to suppose the notion of the petitioners to be unfounded. Unfounded it no doubt is.

5. When viewed and understood in light of this history, the practice of appointing and compensating a chaplain to open each day's legislative session with a prayer must be sustained. This Court has previously observed that a construction of the Constitution made by the First Congress is of special and compelling significance: "It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-329 (1936). Indeed, such a construction of the Constitution by the Founding Fathers and Framers has been accorded conclusive effect (*Myers* v. *United States*, *supra*, 272 U.S. at 175):

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

There is no reason to depart from this settled principle in this case. The Framers of the Establishment Clause themselves perceived no constitutional objection to legislative chaplaincies. Half a century later, committees of the Thirty-First, Thirty-Second, and Thirty-Third Congresses specifically examined this question and reaffirmed

the judgment of the Framers.[10] Moreover, as this Court has observed in an Establishment Clause context, using the words of Justice Holmes: " 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Although it is the Nebraska Legislature's chaplaincy—and not those of the United States Congress—that is challenged in this case, the foregoing principles are equally controlling. The Establishment Clause applies with full force to the several states by incorporation into the Due Process Clause of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). It is hardly plausible that the Establishment Clause could be construed to permit the federal congressional chaplaincies but, at the same time, impose a more stringent standard on the state legislatures—like Nebraska—that have similar chaplaincy practices. Any such construction would be ironic, indeed, because the First Amendment itself is directed solely to the Congress and was not intended to interfere with the various established state religions existing at the time of ratification. See *McGowan* v. *Maryland*, 366 U.S. 420, 440-441 (1961). If, as demonstrated above, the Framers did not intend the Establishment Clause to proscribe the congressional chaplaincies, then the Clause a fortiori does not proscribe similar chaplaincies in the state legislatures.

6. The court of appeals found the Nebraska chaplaincy to be constitutionally objectionable because "[f]or sixteen years, the Nebraska legislature has selected and paid one minister, representing one denomination, to open each

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[10] See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

legislative session with prayer" (Pet. App. 36).[11] These features singled out by the Eighth Circuit for special opprobium—lengthy tenure, compensation, and single denomination[12]—do not meaningfully distinguish the Nebraska practice from the kind of legislative chaplaincy approved by the Framers and early Congresses.

As indicated above (see pages 11-12, *supra*), the congressional chaplains have been paid as officers of the House and Senate since the very first congressional compensation act in 1789. Moreover, the length of service of the congressional chaplains has never been a matter of particular concern. One chaplain of the House, for example, served for 26 years, from 1895 to 1921; and he was succeeded by another chaplain who held that office for 29 years, until 1950. See *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965).

As for denominational variety, it is true that, during the first half-century of the congressional chaplaincy practice, Congress explicitly provided that each House would appoint a chaplain of a different denomination. But the denominations have all been Protestant, with the sole exception of the Catholic Reverend Pise, who served the Senate for a single year in 1832. See A. Stokes & L.

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[11] The court of appeals also objected to the state legislature's publication of prayer books (Pet. App. 36, 38), which occurred only in the years 1975, 1978 and 1979 (Pet. App. 8). As pointed out by petitioners, however, the district court's injunction against the prayer book practice was not appealed and was therefore not before the court of appeals (Pet. 22-23). See note 22, *infra*. In any event, we note that Congress has also occasionally ordered the publication of its chaplains' prayers. See A. Stokes & L. Pfeffer, *supra*, at 478.

[12] We note that the court of appeals' statement that the Nebraska chaplain has been the "exclusive source" (Pet. App. 38) of the opening prayers is factually incorrect. The Nebraska Legislature, like the United States Congress, has on occasion invited other ministers of different denominations and faiths to officiate at the opening prayer (see Pet. App. 20).

Pfeffer, *supra*, at 478-479. It appears that no particular attention has been paid to this matter within each House. Thus, for example, the first eight chaplains appointed by the Senate—serving over a period of 18 years, from 1789 to 1807—were all Episcopalians (Chaplains of the United States Senate, April 25, 1789 to Date (December 8, 1982), on file in the Office of the United States Senate Historian). Similarly, the first three chaplains appointed by the House of Represenatives—serving over a period of 11 years, from 1789 to 1800—were all Presbyterians (*History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965)).

The Eighth Circuit's real objection in this case was not to the fact that only *one person* has served as chaplain in Nebraska for some 16 years, but that only *one denomination* has been represented during that time. Presumably, it would have made no difference to the court of appeals if Nebraska had appointed eight different chaplains of a single denomination over this same 16-year period. Yet, that is precisely what the United States Senate in the first and succeeding Congresses did in the first 18 years of federal government under the Constitution.

Moreover, as recognized by the Supreme Judicial Court of Massachusetts in a case nearly identical to the present case, the question of denominational tenure is more properly viewed as an equal protection challenge then a First Amendment issue. The Massachusetts court rejected such a challenge, explaining that "[t]he mere fact that two persons of a particular faith have been appointed to these positions [legislative chaplains] over the past twenty years does not demonstrate that any other person has ever been denied appointment (a necessary element of any equal protection claim), or that such decisions were based on religious discrimination." *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195, 1199 (1979).

Congress itself has placed great emphasis on the fact that Members are free to select chaplains from any denomination whatsoever, and has concluded that this

freedom of choice negates any possibility of an "establishment of religion." As explained by the Senate Committee on the Judiciary in the 1853 report mentioned above (S. Rep. No. 376, *supra*, at 2-3; emphasis added):

> At every session two chaplains are elected * * *. Now, in this, no religion, no form of faith, no denomination of religious professors, is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. * * * The chaplain is an officer of the house which chooses him, and nothing more. He owes his place not to his belonging to a particular religious society, or holding a particular faith, but to the voluntary choice of the members of the house, and stands, in this respect, upon the same footing with any other officer so elected.
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> * * * * *
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> *True, selections, in point of fact, are always made from some one of the denominations into which Christians are distributed; but that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment.*

The same is true with respect to the Nebraska Legislature, which appoints the chaplain, along with other legislative officers, in accordance with the vote of its members (Tr. 115-121).[18]

Thus, the Nebraska chaplaincy does not deviate in any constitutionally significant way from the kind of legislative chaplaincy envisioned and practiced by the Framers themselves. Accordingly, the Nebraska chaplaincy does not constitute a law or practice "respecting an establishment of religion" within the meaning of the Establishment Clause of the First Amendment.

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[18] "Tr." refers to pages of the transcript of testimony at the trial held in this case on December 1, 1980.

B. Application of the Three-Part *Lemon* v. *Kurtzman* Test Confirms that the Nebraska Chaplaincy Does Not Offend the Establishment Clause of the First Amendment

In *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952), this Court observed that "[t]he First Amendment * * * does not say that in every and all respects there shall be a separation of Church and State." If the rule were otherwise, a number of anomalies would result (*id.* at 312-313; emphasis added):

> [T]he state and religion would be aliens to each other —hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. *Prayers in our legislative halls*; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." [14]

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[14] See also, *Abington School District* v. *Schempp*, 374 U.S. 203, 213 (1963) (Court speaks approvingly of evidence of recognition of God in public life, including the fact that "each House of the Congress provides through its Chaplain an opening prayer"); *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962) (Court speaks approvingly of "patriotic or ceremonial occasions" where "there are many manifestations in our public life of belief in God").

Individual Justices of this Court have expressed similar views in separate concurring or dissenting opinions. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 299-300 (footnote omitted) (Brennan, J., concurring) ("The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements

It is no wonder that there are numerous recognitions of God in public life, for "this Nation's history has not been one of entirely sanitized separation between Church and State," and "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). Thus "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614. At most, the "concept of a 'wall' of separation is a useful signpost." *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 7.

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of the kind prohibited by the Establishment Clause"); *Engel* v. *Vitale*, *supra*, 370 U.S. at 446-450 (Stewart, J., dissenting) (recounts with approval the many religious traditions remaining in government, including the congressional chaplaincies); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 253-254 (1948) (Reed, J., dissenting) (cites examples of permissible federal involvement with religion, including the daily invocations by the congressional chaplains). But see *Engel* v. *Vitale*, *supra*, 370 U.S. at 437-444 (Douglas, J., concurring) (advocates a rule of virtually absolute and total separation of church and state). Other federal and state courts have also dealt with various public recognitions of God and have found them constitutionally unobjectionable. See, *e.g.*, *Bogen* v. *Doty*, 598 F.2d 1110 (8th Cir. 1979) (opening prayer by local clergymen at county board meetings); *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970) ("In God We Trust" motto on federal currency); *O'Hair* v. *Cooke*, Civil Action No. A-77-CA-236 (W.D. Tex. filed Jan. 29, 1980) (opening invocation by local clergyman at city council meetings), aff'd mem., 638 F.2d 1231 (5th Cir.), cert. denied, 454 U.S. 824 (1981) (petition also raised issue of Fifth Circuit court crier's reference to Deity at public court hearing); *Grossberg* v. *Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974) (invocation at public high school graduation); *Marsa* v. *Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) (opening invocation at borough council meetings); *Wiest* v. *Mt. Lebanon School District*, 457 Pa. 166, 320 A.2d 362 (1974) (same); *Lincoln* v. *Page*, 109 N.H. 30, 241 A.2d 799 (1968) (opening invocation by clergyman at town meeting). Of particular relevance to this case is the decision by the Supreme Judicial Court of Massachusetts in *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195 (1979), upholding the constitutionality of the legislative chaplaincies of the state Senate and House of Representatives.

Under these circumstances, the Court has understandably found it impossible to provide " 'bright line' guidance" for readily discerning those situations in which the Establishment Clause has been transgressed by some government involvement with matters of religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 761 n.5. Nevertheless, "there has been general agreement upon the applicable principles and upon the framework of analysis" (*ibid.*). That general framework has been articulated in the form of a three-pronged test, which requires that a challenged governmental statute or action (1) "must have a secular legislative purpose"; (2) must have a "principal or primary effect * * * that neither advances nor inhibits religion"; and (3) "must not foster 'an excessive government entanglement with religion.' " *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613. The Court has found it "well to emphasize, however that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 358-359 (1975).

The wisdom of the Court's admonition concerning the limitations of the three-pronged *Lemon* test is borne out by this case, which seems ill-suited to such an analysis. The test, after all, is merely a device by which the Court seeks to divine the intended meaning and scope of the Establishment Clause. Here, that frequently useful device is simply not needed, because the intended meaning and scope of the Establishment Clause, insofar as the question presented by this case is concerned, emerges quite clearly from the history surrounding its development. This case does not involve the more typical situation in which a modern-day state law must be tested against the evils that the Establishment Clause was designed to eradicate. See, *e.g.*, *Lemon* v. *Kurtzman*, *supra*. Rather, this case involves a unique situation in which the challenged state practice is one that was engaged in by

the Framers themselves—before, during and after the fashioning and ratification of the First Amendment.

In these circumstances, analysis of the legislative chaplaincy practice under the *Lemon* test seems pointless.[15] The historical analysis above should alone suffice to demonstrate that the Nebraska chaplaincy does not run afoul of the constitutional command against "an establishment of religion." Nevertheless, a review of the legislative chaplaincy under the three-part *Lemon* test confirms that the Nebraska practice challenged in this case is constitutionally permissible.

1. *Secular Legislative Purpose.* The district court, based on the testimony and evidence presented at trial, found that the Nebraska chaplain's opening invocation

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[15] As the court recently stated when applying the four-part test to determine whether an implied cause of action has been created by a particular statute, "there is no need for us to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 34, citing *California* v. *Sierra Club*, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in the judgment). Similarly, the Court's decision just last Term in *Larson* v. *Valente*, No. 80-1666 (Apr. 21, 1982), indicates that the *Lemon* test need not be applied in all Establishment Clause contexts. *Larson* involved a Minnesota statute granting preferential treatment to the well-established churches that receive more than half of their charitable contributions from their members. Other, less entrenched religious organizations were to be subjected to various registration and reporting requirements. In striking down the statute, the Court announced that "application of the *Lemon* tests is not necessary to disposition of the case before us" (slip op. 23). Although the issue presented by this case, in which legislators merely vote their personal preference for the Office of Chaplain, in no way resembles the *statutory* classification of different religions challenged in *Larson* and is therefore not subject to the same kind of Establishment Clause analysis applied by the Court in that case, *Larson* is at least relevant to show that the Court will not slavishly adhere to the three-part test and will apply a different mode of analysis where appropriate. In this case, as indicated above, an historical analysis not only is more appropriate but is also determinative. There is no need here to "trudge through" the three parts of the *Lemon* test.

does indeed serve a secular legislative purpose: "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner" (Pet. App. 13). See Tr. 96, 111-113, 121-123. While acknowledging that the chaplain's opening prayers may well have "a religious purpose for the chaplain and those who choose to listen for spiritual reasons," the trial court emphasized that "[t]he prayers also have a secular purpose, and it is genuine enough and strong enough to meet the constitutional measurement" (Pet. App. 14).

A similar view of opening prayers at legislative sessions was endorsed by the Supreme Judicial Court of Massachusetts in *Colo* v. *Treasurer & Receiver General*, *supra*. The court analyzed the Massachusetts legislature's chaplaincy practice under the three-pronged *Lemon* test and held with respect to the first prong now under discussion that "[t]he secular purposes of opening invocations are the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform" (392 N.E.2d at 1200).

The Eighth Circuit, too, expressed a similar sentiment with regard to the invocation at county board meetings challenged in *Bogen* v. *Doty*, 598 F.2d 1110 (1979). There, the court of appeals acknowledged the "clearly secular purpose" of "establishing a solemn atmosphere and serious tone for the board meetings" (*id.* at 1113). The court further observed that "[t]here is certainly nothing sinister in that purpose," and it could not "say that a prayer will not advance that goal" (*id.* at 1113-1114).

In this case, however, the Eighth Circuit rejected the legitimacy of such a secular legislative purpose, concluding that the purpose of the Nebraska practice "must be to advance and give preference to one religious view over others" (Pet. App. 36). The court offered nothing but conjecture to justify its conclusion, asserting that "[t]here is little other reason for singling out one minister of

one denomination for such an extended period of time * * *" (*ibid.*). It is clear, however, that the court of appeals' unsupported assumption cannot withstand reasoned analysis.

The retention of a single minister for a long period of time has no bearing on the legitimacy of the secular legislative purpose of opening each legislative session with a prayer. As explained in the testimony of State Senator Frank Lewis, Chairman of the Executive Board of the Legislative Council of the Nebraska Unicameral (Tr. 123; emphasis added):

> Dr. Palmer [the Chaplain] has had the job. He's done it in a very satisfactory way. Dr. Palmer is a personal friend, I think, of most of us. I certainly include him as one of my personal friends. You know, I don't see the necessity for changing. And particularly *the necessity would only come if anybody thought that there was an attempt to inject some kind of a religious dogma into that area, which I have not seen.*

The key point, as recognized by Senator Lewis and by the district court, is that the chaplain's secular function in opening the day's proceedings with an invocation has nothing to do with any particular "religious dogma." The chaplain does not appear as the representative of any particular church (Tr. 83). The chaplain has testified that he "never, never should, never would, never will, never have infused [his] particular religious convictions into the minds of the Senators" (Dep. 14).[16] His prayers are strictly nondenominational in character and content (Dep. 5, 7, 17-18, 35).

Thus, the fact that a single minister of a single denomination has served as the legislature's chaplain for many years is simply not relevant to the performance

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[16] "Dep." refers to pages of the deposition testimony of the Reverend Robert E. Palmer, Chaplain of the Nebraska Unicameral, taken on May 27, 1980, and admitted into evidence at trial as Exhibit No. 5 (Tr. 1).

of his secular purpose in bringing the session to order and establishing the proper tone and atmosphere for the day's proceedings. Indeed, the legislature's apparent lack of concern over the particular denomination of its chaplain actually serves to reinforce—not to detract from—the chaplain's secular legislative purpose.[17]

2. *Principal or Primary Effect.* The district court also found "as a matter of fact" that "[t]he primary effect of the prayers * * * is neither to advance nor to inhibit religion. * * * The having of prayers in the legislature of Nebraska does not have a direct and immediate effect of advancing or inhibiting religion" (Pet. App. 14). Rather, "the effect of the practice of an invocation * * * is in fact primarily secular" (*ibid.*). Whether relying "upon the opinions of the witnesses in this case as to

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[17] We note that the Massachusetts chaplaincy practice upheld in *Colo* v. *Treasurer & Receiver General, supra,* involved two Roman Catholic chaplains who had served in the state House and Senate for 24 years and 20 years, respectively. See 392 N.E.2d at 1196. It will also be recalled, as mentioned earlier, that the first eight chaplains of the United States Senate—serving over a period of 18 years—were all Episcopalians, and that several individual congressional chaplains have served quite lengthy terms—one as long as 29 years. See page 16, *supra.* The fact that the early practice of the United States Congress was to appoint a chaplain of a different denomination in each House and interchange them weekly does not undercut our analysis here. It may well be that the Founding Fathers, only recently out from under the established Church of England, desired to avoid the appearance of establishing a single denomination in the Houses of Congress. But any such concern that might have existed at that time rapidly dissipated over the years as the secular, nondenominational purpose of the opening prayer in Congress became the predominant feature. There was no longer any reason to dwell on the particular denomination of the chaplain, and the practice of interchanging chaplains of different denominations was understandably abandoned. In any event, as this Court made clear in *McGowan* v. *Maryland,* 366 U.S. 420, 431-449 (1961), an original religious purpose does not invalidate governmental action if the modern purpose has become predominantly secular. See also, *Walz* v. *Tax Commission, supra,* 397 U.S. at 687 n.8 (Brennan J., concurring).

the actual effect, or, on the other hand, upon evidence of the nature of the practice and my view of the probable consequences rationally to flow from that nature," the trial court's finding remains the same—the Nebraska chaplain's opening invocation does not have the primary effect of advancing or inhibiting religion (Pet. App. 15).

The district court found this case readily distinguishable from the "school prayer" cases, which involved impressionable young students whose attendance at public school was compulsory (Pet. App. 16-17). See *Abington School District* v. *Schempp, supra; Engel* v. *Vitale, supra.* As explained in *Colo* v. *Treasurer & Receiver General, supra,* 392 N.E.2d at 1200:

> By contrast, mature legislators may reasonably be assumed to have fully formed their own religious beliefs or nonbeliefs. The provision of a ceremonial moment of meditation at the opening of the legislative session is unlikely to advance religious belief either among the legislators or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries.

The observation of Justice Brennan in his concurring opinion in *Abington* (374 U.S. at 299-300) is also instructive in this regard: "Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." On the facts of this case, the trial court found that respondent Chambers "has had only minor inconvenience in absenting himself and has suffered no significant obloquy as a result of his nonattendance" (Pet. App. 17).[18]

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[18] Respondent Chambers' testimony at trial discloses that he routinely leaves the legislative chamber without incident prior to the chaplain's invocation (Tr. 4, 11, 32). It is worth noting, for purposes of comparison, that it is established precedent in the United States House of Representatives that the chaplain's opening prayer, although a part of the House proceedings, is not a matter of business requiring the presence of a quorum, and at-

The Eighth Circuit, in *Bogen* v. *Doty*, *supra*, 598 F.2d at 1114, held that the primary effect of the opening prayer at the county board meeting was merely "the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting." The court of appeals then stated the proposition more broadly, as a general rule: "we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion" (*ibid.*). In this case, however, the appellate court abandoned that general rule, ignored the factual findings of the trial court, and concluded without any factual support that the Nebraska chaplaincy practice has a primary effect of advancing religion and giving "preference to one religious view" (Pet. App. 36-37).

Our analysis of the court of appeals' error regarding the secular legislative purpose of the opening prayer is equally applicable here with regard to the primary effect of that prayer. Again, the court's unsupported assumption cannot survive logical scrutiny.

As discussed above, the opening prayers are strictly nondenominational (Dep. 5, 7, 17-18, 35); they typically last only one or two minutes and do not teach "religious dogma" (Tr. 11, 102, 123). The chaplain does not appear as a representative of any particular church (Tr. 83), and he does not instill his own "particular religious convictions into the minds of the Senators" (Dep. 14). Moreover, the chaplain's compensation is paid directly to him and not to any church (Dep. 4; Tr. 82), and he uses it as he would any other money that he might receive (Tr.

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tendance "is not compulsory." 60 Cong. Rec. 2592 (1921). See 6 C. Cannon, *Precedents of the House of Representatives* § 663 (1936). The 1853 Senate Report previously discussed made the same point (S. Rep. No. 376, *supra*, at 2):

> There is no compulsion exercised or attempted, upon any member or officer of either house, to attend their prayers or religious solemnities. No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend.

82). No legislator has ever even joined the chaplain's church as a result of his morning invocations (Dep. 49).

In sum, the opening prayers may well acknowledge religion, but they do not advance religion (Tr. 105-106). Rather, their primary effect is simply to accomplish the secular purpose of bringing the legislature to order in a ceremonial and traditional manner that fosters a suitably solemn atmosphere for the conduct of important legislative business (Tr. 96, 111-113, 121-123). It is of no constitutional consequence that the opening prayers might be perceived by some observers to aid religion in a general way (see Tr. 20, 107), for "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law." *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 775. See also, *e.g.*, *McGowan* v. *Maryland*, *supra* (Sunday Closing Laws sustained even though they foster respect for religious observances and facilitate attendance at church); *Walz* v. *Tax Commissioner*, *supra* (church property tax exemptions sustained notwithstanding obvious financial benefit to religious organizations); *Everson* v. *Board of Education*, *supra* (reimbursement for children's bus fares sustained despite indirect aid to church schools).[19]

3. *Excessive Entanglement.* With respect to the third prong of the *Lemon* test, the district court held that "the saying of the prayers alone entangles the state in religious affairs only nominally. The entanglement is not excessive" (Pet. App. 18). The trial record reflects that the chaplain's invocations are brief (Tr. 11, 102) and that the Legislature exercises no control or influence whatsoever over their content (Tr. 65-69; Dep. 4). Further-

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[19] The irrelevance of the fact that a single denomination has been represented in the chaplaincy over a long period of time has already been discussed and need not be repeated. See pages 16-18, 24-25, *supra*. The main point is that the invocations are nondenominational; there is thus no reason for the Nebraska Legislature to show concern for denominational variety in selecting its chaplain.

more, the process for appointing a chaplain is the same as for other legislative officers and is usually a matter of no particular concern (Tr. 115-117, 120-121). Only once, so far as the record reflects, was there any dispute or debate over the selection of a chaplain, and some of that debate was generated by the objections of respondent Chambers himself (Tr. 29-30, 83-85, 117-120).[20] In any event, the matter was quickly resolved by vote on the Senate floor; Senator Chambers' objections were rejected and Chaplain Palmer was retained (Tr. 120).

Thus, the observations of the Supreme Judicial Court of Massachusetts in *Colo* are equally applicable here (392 N.E.2d at 1200-1201, quoting *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622):

> There is no evidence that a great degree of government entanglement with religion is occasioned by the employment of legislative chaplains. The prayers offered are brief, the content unsupervised by the State, and attendance completely voluntary. There is no evidence that the State has become embroiled in any difficult decisions about which religions are to be represented or what sorts of invocations are to be offered.[21] As far as the record reveals, there is

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[20] The only "divisiveness" over the chaplaincy suggested by the record is that respondent Chambers is opposed to that legislative office and has raised his objections through general public announcement (Tr. 6-7, 77), through parliamentary maneuvers (Tr. 7, 119-120), and through this lawsuit (Tr. 4-36). Apart from Senator Chambers' objections, the record reflects only that the chaplain indirectly heard that one senator objected to the explicit Christian tone of a prayer offered by a guest chaplain (Tr. 77).

[21] As we have demonstrated, the chaplain's formal religious affiliation is irrelevant to fulfillment of his secular duties. Under these circumstances, the sort of excessive concern for denominational variety displayed by the court of appeals is, we suggest, far more likely to lead to impermissible governmental entanglement with religion than the current practice of retaining one chaplain, of whatever denomination, for as long as he properly performs his duties (see page 24, *supra*). Any requirement for periodic de-

> not the slightest hint that the practice of employing legislative chaplains has ever created any of the political divisiveness which "was one of the principal evils against which the First Amendment was intended to protect."

Nevertheless, the Eighth Circuit again summarily rejected the district court's conclusion and announced that the Nebraska chaplaincy practice "engenders serious political division along religious lines. The result is the type of excessive entanglement which must be avoided under the First Amendment" (Pet. App. 37). The main reason for the court of appeals' conclusion on excessive entanglement appears to be the use of "state monies to compensate the same minister for sixteen years" (*ibid.*). We have already answered the appellate court's mistaken views on lengthy tenure and denominational variety (see pages 16-18, 24-25, *supra*), and we will now address the question of compensation.[22]

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nominational changes, for example, would likely involve the legislature in such matters as interviewing various candidates about their religious beliefs or examining the content of their prayers. No such difficulties are engendered by the current practice.

[22] Although the district court, unlike the court of appeals, treated the salary question as an entirely separate matter, its opinion reflects agreement with the Eighth Circuit's view that payment of compensation to the chaplain is impermissible under the circumstances of this case (Pet. App. 18-21). The district court, however, held that the other elements of the Nebraska chaplaincy practice are constitutionally permissible under the three-part test, whereas the Eighth Circuit held that all elements of the practice, "taken as a whole," are unconstitutional (Pet. App. 37). We note our disagreement with the court of appeals' indivisible approach to the issues presented. Although the various elements of the chaplaincy practice are obviously related, it makes no sense to hold that the entire practice must fail if, for example, the printing of prayer books is thought to be constitutionally infirm. In any event, as previously noted (see note 11, *supra*), Nebraska did not appeal the district court's injunction against the printing of prayer books. Thus, the court of appeals surely erred when it included as part of the practice "taken as a whole" a feature no longer in issue.

There is no inherent constitutional prohibition against government payments to religious figures or institutions. As explained by Justice Blackmun in his plurality opinion announcing the judgment of the Court in *Roemer* v. *Board of Public Works*, 426 U.S 736, 746 (1976):

> It long has been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task. In *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), the Court upheld the extension of public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood acting "under the auspices of said church," *id.*, at 297, was limited by its corporate charter to the secular purpose of operating a charitable hospital.

Thus, in Justice Blackmun's words, "*Bradfield* dispels any notion that a religious person can never be in the State's pay for a secular purpose" (426 U.S. at 746; footnote omitted) (plurality opinion). Here, the State of Nebraska is merely paying a salary to one of its public officers—the Chaplain of the Nebraska Legislature. Once it is determined—as the district court found and as we have shown—that the chaplain's pay is for the performance of a predominantly secular function, there can be no constitutional objection to that payment any more than one could object to similar payments to the legislature's clerk or sergeant-at-arms.

Moreover, even if a reasonable objection could be raised to a paid legislative chaplaincy if it were a novel concept, the fact is that paid chaplaincies have been in the legislatures of this country from the very beginning—and in the Nebraska Legislature since statehood was achieved in 1867 (Pet. App. 11). It is certainly true, as this Court stated in *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." But, by the same

token, "an unbroken practice" of paid legislative chaplaincies "is not something to be lightly cast aside" (*ibid.*).

In *Walz*, the Court found that the 200-year history of church property tax exemptions showed that such exemptions were not regarded as violative of the Constitution and that no threat to religious liberty had been posed. The Court's observations in *Walz* are equally applicable here. The two-century history of paid legislative chaplaincies in this country has not "given the remotest sign of leading to an established church or religion" (397 U.S. at 678). Nor is it plausible to suggest that paid legislative chaplaincies are "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*ibid.*). If paid legislative chaplaincies "can be seen as this first step toward 'establishment' of religion, * * * the second step has been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits'" (*ibid.*).

Thus, the Nebraska Legislature's chaplaincy practice does not involve any excessive government entanglement with religion. The Establishment Clause simply does not require "complete obliteration of all vestiges of religious tradition from our public life." *Colo* v. *Treasurer & Receiver General*, *supra*, 392 N.E.2d at 1201. Rather, the courts, in grappling with the difficult and sensitive constitutional questions in this area, must demonstrate "the ability and willingness to distinguish between real threat and mere shadow." *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 308 (Goldberg, J., concurring). This Nation's experience with paid legislative chaplaincies over the past 200 years confirms that the practice certainly poses no "real threat" to religious liberty and is, at most, a "mere shadow" of a threat in the eyes of few beholders—a shadow that entirely fades away in the light of history.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-23-CFX
Status: GRANTED

Title: Frank Marsh, State Treasurer, et al., Petitioners
v.
Ernest Chambers

Docketed:
July 6, 1982

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Cronk, Shanler Del

Counsel for respondent: Pevar, Stephen L.

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1982	G	Petition for writ of certiorari filed.
2	Aug 2 1982		Brief of respondent Ernest Chambers in opposition filed.
3	Aug 4 1982		DISTRIBUTED. September 27, 1982
6	Oct 25 1982		REDISTRIBUTED. October 29, 1982
8	Nov 1 1982		The petition for a writ of certiorari is granted limited to Question 4 presented by the petition.
			**********
9	Dec 16 1982		Joint appendix filed.
10	Dec 16 1982		Brief of petitioner Frank Marsh, etc. filed.
11	Dec 16 1982		Brief amicus curiae of Natl. Conference of State Legislatures filed.
12	Dec 16 1982		Brief amicus curiae of United States filed.
13	Dec 14 1982		Application for leave to file brief, amicus curiae, in excess of page limitations, and order granting same not
14	Dec 14 1982		to exceed 33 pages, by Blackmun, J., 12/14/82.
15	Dec 30 1982	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for argument filed.
16	Jan 5 1983		Response of respondent to motion of the Solicitor General for leave to participate in oral argument filed.
17	Jan 5 1983		Record filed.
18	Jan 5 1983		Certified original record & proceedings received.
20	Jan 5 1983		Order extending time to file brief of respondent on the merits until January 22, 1983.
21	Jan 11 1983	D	Motion of Jon Garth Murray, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument filed.
22	Jan 17 1983		Motion of the Solicitor General for leave to participate in oral DENIED.
23	Jan 17 1983		Motion of Jon Garth Murray, et al. for leave to participate in DENIED.
24	Jan 13 1983		Brief amicus curiae of Jon Garth Murray, et al. filed.
25	Jan 19 1983		Brief amicus curiae of American Jewish Congress filed.
26	Jan 19 1983		Record filed.
27	Jan 24 1983		Brief of respondent Ernest Chambers filed.
28	Jan 25 1983		Brief amicus curiae of Anti-Defamation League B'nai Brith filed.
29	Mar 10 1983		Reply brief of petitioner Frank Marsh, etc. filed.
30	Mar 10 1983		CIRCULATED.
31	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 20, 1983. (3rd case) 1 hour

No. 82-23-CFX

Entry	Date	Note	Proceedings and Orders
32	Apr 20 1983		ARGUED.